

C5V0RNCA(correctedx2) Argument

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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DINLER, et al,

Plaintiff,

v.

04 CV 7921

CITY OF NEW YORK, et al,

Defendant.

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New York, N.Y.

May 31, 2012

3:30 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

For Plaintiff:

CHRISTOPHER T. DUNN  
NEW YORK CIVIL LIBERTIES UNION

MICHAEL L. SPIEGEL

JONATHAN C. MOORE  
BELDOCK LEVINE & HOFFMAN LLC  
JEFFREY ADAM ROTHMAN

For Defendant:

PETER GERARD FARRELL  
NEW YORK CITY OFFICE OF THE CORPORATION COUNSEL

1 (Case called, in open court)

2 THE COURT: All right. My preference would be to have  
3 everybody have a seat if we can, so try to find a seat. Great,  
4 thanks.

5 All right. We are here on the parties' motions for  
6 summary judgment, which is a mountain of material. And I  
7 was tempted to just stack it to see how high it went, but I  
8 didn't have the insurance for it, so. And then there's hours  
9 of video footage. I have been through it all. It's a lot of  
10 material, even though this is an abbreviated motion, really,  
11 for summary judgment on issues that the parties believed would  
12 sort of help get the ball rolling and were sort of the clearest  
13 examples as to why summary judgment was appropriate.

14 So I have looked at those materials, I have received  
15 correspondence from the parties as to how we're going to divide  
16 up the argument today. Got my chess clock, you each get an  
17 hour. And I'm going to stick to it, just because I think we  
18 could go all night, otherwise. So I am going to hold you to  
19 it, so be strict. If you are dividing up arguments, make sure  
20 that you stick by your deadlines, because otherwise you are  
21 taking from others.

22 So, remind me of how we're gonna do this.

23 MR. DUNN: Your Honor, I'm going to start, and then  
24 Mr. Spiegel is going to go, and then Mr. Moore.

25 THE COURT: Okay. And do you have time?

1 MR. DUNN: We're going to take about 40 minutes of our  
2 time now on the cross-motions on the false arrest claims. And  
3 we'll reserve 20 minutes for response on those motions, as well  
4 as the no summons policy.

5 THE COURT: All right, so 40 now, and then 20 as  
6 rebuttal?

7 MR. DUNN: Yes.

8 THE COURT: For the City?

9 MR. FARRELL: We are going to address our -- we moved  
10 at the same time on the two arrest locations, so we'll address  
11 our motions, as well as proposed plaintiffs' motions on Church  
12 and Fulton and 16th Street, and we will then go directly into  
13 our motion on the no summons and fingerprint policy. And my  
14 intent is to reserve either 5 or 10 minutes of that time so  
15 that we will have a final rebuttal.

16 THE COURT: All right. And I think that's fair, since  
17 they're the only ones moving, there's not cross-motions for the  
18 ones you are reserving on.

19 Okay. All right, I have got the court security  
20 officers here since we have a number of people standing. I  
21 want to make sure that's all right. I have additional chairs  
22 in the jury room that we can use. Should we take a minute to  
23 do that?

24 THE MARSHAL: Yeah.

25 THE COURT: Thank you. If I had known it was going to

1 be this many folks, I might have arranged for a larger  
2 courtroom.

3 Thanks.

4 (Pause)

5 MR. FARRELL: While waiting for that, I just wanted to  
6 ask the Court to make sure that you received our letter  
7 regarding the Bernini case out of the Eight Circuit that we  
8 sent in after the summary judgment motions were fully  
9 submitted. That case was just decided in the beginning of  
10 2012.

11 THE COURT: I'm all over it. I'm all over it.  
12 Nothing happens in the Eighth Circuit, that I don't know.

13 Okay, are we ready?

14 All right. So, Mr. Dunn, you are going to lead off?

15 MR. DUNN: I am.

16 Good afternoon, your Honor. This is moment that has  
17 been a long time in coming. But the passage of time has done  
18 nothing to diminish the importance of the issues before you  
19 today. With over 1800 arrests at the Republican National  
20 Convention of 2004, that stands as the largest number of  
21 arrests in American presidential convention history.

22 We are here, today, to talk about the two largest mass  
23 arrests in 2004 that involved nearly 600 people at Fulton and  
24 East 16th Street. And those arrests, your Honor, sent a very  
25 loud and destructive message. And that message was, if you

1 were a protestor, if you were a legal observer, if you were a  
2 journalist covering a protest, if you were a member of the  
3 public watching a protest from a public sidewalk, or you were  
4 just a bystander in the vicinity of the protest, you could be  
5 summarily swept up by the police, arrested, handcuffed,  
6 fingerprinted, in some instances held for days, having done  
7 nothing wrong.

8 And we are here, today, to ask you to send an equally  
9 powerful message that when police officials act unreasonably  
10 and they violate the Constitution, they will be held  
11 accountable in federal court and, hopefully, that this message  
12 will be heard loudly and clearly by protestors in the future,  
13 and by police commanders in the future.

14 THE COURT: All right, on tapes, I heard some  
15 protestors saying: I don't need a permit, the only permit I  
16 need is the Constitution.

17 Do you agree with that?

18 MR. DUNN: In many instances, I absolutely agree with  
19 that --

20 THE COURT: Do you agree with that at Fulton Street?

21 MR. DUNN: Absolutely. New York City, you do not need  
22 a permit to march on the sidewalk, but you do not need to reach  
23 that. Because we win, regardless of whether or not a permit  
24 was required, because a permit was granted. But I will --

25 THE COURT: And with respect to East 16th Street, are

1 you suggesting everybody was on the sidewalk?

2 MR. DUNN: No, your Honor.

3 THE COURT: No.

4 MR. DUNN: I'm not suggesting that at all.

5 THE COURT: Did they have a permit there?

6 MR. DUNN: There was no permit there.

7 THE COURT: And are you suggesting that the  
8 Constitution was the only permit that was needed to parade in  
9 street with a band and with dancing and --

10 MR. DUNN: No, your Honor, that's not the issue on  
11 East 16th Street. The issue on East 16th Street is, and it's  
12 undisputed, the police sent a large group of people who were in  
13 the street -- regardless of what you may think of that -- in  
14 the street, into a bustling city block on a summer evening that  
15 hundreds of people on it, who had nothing to do with that  
16 event. And they sealed off both ends of the block. And  
17 someone, for instance, like our client, Dinler, who was just  
18 completely emblematic of other people, she's just walking down  
19 the block. She tries to get out at each end, she cannot get  
20 out. She ends up essentially having a panic attack and  
21 collapsing in the street and is taken to a hospital. She  
22 didn't need a permit to be walking down East 16th Street to go  
23 to work. And the people who were watching that event from the  
24 sidewalk didn't need a permit to be watching it. And the  
25 problem with East 16th Street is, whatever you may think about

1 some of the people who went into the street initially, there  
2 were a huge number of people who anyone would recognize were  
3 completely law-abiding people who just happened to be on a City  
4 block on a summer evening. So if I can, let's turn to the law,  
5 because we are obviously going to get to that. The way we  
6 structured this is I'm going to talk about the law with  
7 respect -- that covers both locations. Mr. Spiegel will talk  
8 about Fulton Street. Mr. Moore will talk about East 16th  
9 Street. As you mentioned, you have had a lot of materials  
10 thrown at you. And I recognize that, from prior dealings with  
11 you, you will be the most prepared person here in the room --

12 THE COURT: I don't know that, it's a big room.

13 MR. DUNN: I know that. And our goal here is to show  
14 you the simple, clear path we have to summary judgment. And it  
15 starts with the recognition, we had damage claims here.

16 The defendants have asserted qualified immunity. So  
17 the ultimate issue you have to decide is whether or not a  
18 clearly established right was violated. And to be clear, the  
19 right that we claim was clearly established as law in 2004 was  
20 the right for an individual not to be arrested without  
21 individual probable cause, regardless of whether or not they  
22 were in the vicinity of unlawful activity.

23 And I don't think anyone disputes that right was  
24 clearly established at the time. And in conjunction with that,  
25 the City bears the burden, since these were warrantless arrests

1 of proving probable cause. It's their burden.

2 So then we go back to the premise we started with  
3 about a year ago with you. It's undisputed the City can say  
4 nothing about any unlawful activity about any of the  
5 plaintiffs. There are court orders to that effect in all of the  
6 cases.

7 THE COURT: Just so we are clear, Judge Francis made,  
8 you know, issued an order in which he made it clear that the  
9 City was offering no law enforcement witness --

10 MR. DUNN: No.

11 THE COURT: -- who can testify to that.

12 But let me just focus on what Judge Francis said.

13 MR. DUNN: Okay.

14 THE COURT: But he didn't foreclose the ability to  
15 introduce evidence.

16 MR. DUNN: Well, I have got -- the order in our case,  
17 for instance, says: Defendants have no personal knowledge of  
18 plaintiff's actions, this includes any member of the NYPD.

19 THE COURT: Uh-huh. But I mean so this is Judge  
20 Francis' order from November 28, 2006 in MacNamara, Abdell and  
21 Adams to say: Defendants are deemed to have admitted that with  
22 respect to each plaintiff in those three cases, they cannot  
23 identify any member of the NYPD who has personal knowledge of  
24 individual conduct of that plaintiff which served as the basis  
25 for that plaintiff's arrest. This does not preclude the



1 defendants from presenting evidence that a plaintiff was within  
2 a group of individuals allegedly engaged in unlawful activity,  
3 or from arguing that such evidence is sufficient to demonstrate  
4 probable cause.

5 It's that last sentence that I'm not sure exactly what  
6 he had in mind. But I think if I have a hunch, I think it's to  
7 talk about a group probable cause as a theory.

8 MR. DUNN: Yes.

9 THE COURT: But it might also be about whether or not  
10 there is, perhaps, you know, a video that shows a particular  
11 person clearly -- clearly engaging in unlawful conduct that  
12 would constitute probable cause for that individual.

13 MR. DUNN: Your Honor, it may be that he allowed that.  
14 I know that in our case, and I think it's true in most cases,  
15 he ordered that the City had no knowledge about any actions by  
16 the individual. And I grant you, recognizing they can say they  
17 were there -- and of course they were there. But the point is  
18 that we are starting from the premise -- and I think for the  
19 purposes of summary judgment, it is certainly true that the  
20 City doesn't have any information about any individual unlawful  
21 activity by any of the plaintiffs.

22 Normally, that would be the end of the discussion.  
23 Normally, plaintiff would win.

24 THE COURT: But they have attached videos. I have  
25 seen people parading on the street, right? If I conclude they

1 were parading without a permit, that's evidence of unlawful  
2 activity, right?

3 MR. DUNN: That may well be, and if they can identify  
4 specific people on specific videos who were doing that, that  
5 takes us out of the premise of these motions.

6 As you may recall, the premise of these motions -- and  
7 it is certainly true with the plaintiffs in our cases and I  
8 believe it is true in most cases, is the City, in fact, through  
9 video or anything else, has no ability to identify particular  
10 individuals who engaged in unlawful activity. But more  
11 importantly, for any individual plaintiff can't say that that  
12 person was doing something unlawful.

13 THE COURT: All right. Well, I'll hear what the City  
14 has to say about that, because I do think there is a certain  
15 amount of interpretation of Judge Francis' order in one or more  
16 of the cases that might be worth hearing about. But you're  
17 basically saying, I think, that there is no group probable  
18 cause theory that can be proceeded upon.

19 MR. DUNN: That's right. They want to proceed on a  
20 group probable cause theory.

21 THE COURT: Which the DC Circuit and now the Eighth  
22 Circuit have recognized. To a point.

23 MR. DUNN: Well, let's be very careful about that.

24 THE COURT: To a point.

25 MR. DUNN: Okay. To a point. Okay.

1 First, the Supreme Court has never recognized that.  
2 The Second Circuit has never recognized it. In fact, it  
3 rejected it in the one case where it was raised, which is Jones  
4 vs. Parmley. There are the other two cases you mentioned,  
5 there's a DC Circuit case Carr, another Circuit case, Bernini,  
6 that's what the City hangs its hat on. And the question is, is  
7 what happened here the same thing as what happened there. And  
8 I think, clearly, the answer to that is no. Carr, and I know  
9 that you --

10 THE COURT: The answer to, what, is no?

11 MR. DUNN: Whether or not what happened here is the  
12 same thing that happened in those two cases.

13 In Carr, as I'm sure you know, we have an actual riot  
14 happening. We have people lighting things on fire, throwing  
15 rocks through bank windows, throwing rocks through police  
16 cruiser windshields. There's a police officer affidavit that  
17 identifies every single person in the crowd as engaging in  
18 unlawful activity. They were steered into an alley, late at  
19 night, that is otherwise secured, and they arrest people. And  
20 they charge them with a rioting offense.

21 Similar situation in Bernini, with one twist that is  
22 relevant. Rioting happening. They identify a discrete group  
23 of people. They then chased them into a space where there are  
24 other people, to be sure. They then spent a lot of time  
25 separating the other people. They ended up taking 200 people

1 out of that group and they are left with 160 arrestees.  
2 Neither of those cases changes the core Fourth Amendment  
3 principle that you have to have individualized probable cause  
4 for every person who gets arrested. They just described a  
5 unique or very narrow set of circumstances in which you can do  
6 that by relying upon information about a group. And there,  
7 which you had, was you have to have. First, you have to have  
8 an assembly-type offense. Both of those are rioting type  
9 offenses.

10 THE COURT: Do you think it turns on rioting, as  
11 opposed to just unlawful parade?

12 MR. DUNN: Absolutely. In the sense that in both of  
13 those cases, your mere presence and proximity to rioting was an  
14 element of the offense. That's very different than parading  
15 without a permit, where you have to show the individual is  
16 violating the statute. Whether they are doing it next to  
17 somebody else or not is completely irrelevant. So what makes  
18 those cases work, is the fact that you have an assembly of  
19 related offenses. That is one.

20 Secondly, both of those cases, the Court said, there  
21 was evidence to show that every single person in the group was  
22 engaged in unlawful activity. That is the touchstone of the  
23 Fourth Amendment.

24 And, third, you had to be sure, at the end of the day,  
25 that the people who got arrested, were only the people who were

1 engaged in the unlawful activity. So, for instance, in Carr  
2 you have people in an alley late at night, some of the people  
3 who are left. In Bernini, they had this whole process of  
4 pulling people apart.

5 THE COURT: Right. But they -- if you look at the  
6 numbers in Bernini, it seems like if you to go back to the  
7 analogy that has been used before, they have a few dolphins  
8 with tuna, right. And the Court says, well, that doesn't have  
9 to be that that can't happen.

10 MR. DUNN: We are not saying it can't happen, your  
11 Honor. There, they took out 200 people, okay. The vast  
12 majority of people -- the majority of people who were in that  
13 location, got taken out, removed, and were not arrested.

14 THE COURT: More got removed than were arrested.

15 MR. DUNN: More got removed than got arrested, and  
16 there was a sustained effort to remove people who they did not  
17 believe were part of the group.

18 THE COURT: The nature of the sustained effort is not  
19 exactly clear in the Eight Circuit cases, it seems to me. I  
20 mean they throw the numbers around, but it's not clear exactly  
21 what they did to separate dolphins and tuna.

22 MR. DUNN: That's fair enough. But I think what is  
23 clear, is that the principle that both those cases still  
24 recognize, and they cannot change this because this is Supreme  
25 Court law. You have to, at the end of the day, conclude -- or

1 that a reasonable officer would have concluded that everybody  
2 getting arrested had engaged in unlawful conduct. Even if you  
3 are wrong for a few people, you still have to reasonably  
4 believe that.

5 And with respect to the two locations, I'm going to  
6 turn this over to Mr. Spiegel and Mr. Moore. But the short of  
7 it is, at Fulton Street, whatever you may think about the  
8 cohesiveness of the people there -- and I don't think that is a  
9 cohesive unit, when you look at the video. It is our position  
10 that no reasonable officer could have concluded -- and you can  
11 look at the video -- that everybody walking on that sidewalk  
12 had violated the law at East 16th Street and, therefore, they  
13 don't come close to qualifying to Bernini, setting aside there  
14 is no rioting that has taken place. We don't think that Carr  
15 and Bernini are even eligible here. But, on the facts, they  
16 are very different. With East 16th Street, whatever you may  
17 think about what happened at the beginning of that event and  
18 whatever you may think about what some people did on East 16th  
19 Street, it is undisputed that the police diverted this whole  
20 group of people into a city block that had all kinds of people  
21 in it who were just there minding their own business. And the  
22 undisputed evidence of record shows they did very little, and  
23 certainly not enough, to assure that the only people getting  
24 arrested were people engaged in unlawful activity. And, not  
25 surprisingly, a lot of innocent people got arrested. You know

1 this is a city block on a summer evening that was full of  
2 people.

3 All right, so with that, I'm going to turn it over  
4 because the chess clock is running, and I understand the issue  
5 about chess clocks. The one thing I would ask, later on, if  
6 you have questions about the fingerprinting claim, I will of  
7 course address them.

8 THE COURT: Are you planning to -- is somebody  
9 planning to address that at some point?

10 MR. DUNN: I will address it when we respond to the  
11 City, because I want Mr. Spiegel and Mr. Moore to get up.

12 THE COURT: Okay.

13 All right, Mr. Spiegel, you are talking about Fulton  
14 Street.

15 MR. SPIEGEL: About Fulton Street.

16 Your Honor, in the Bernini case, the Eighth Circuit  
17 said that the touchstone of the Fourth Amendment is  
18 reasonableness under the circumstances presented. And the  
19 context, the circumstances presented at Fulton Street, was a  
20 peaceful sidewalk protest where arrests were simply  
21 unreasonable. It was unreasonable to believe that the sidewalk  
22 was obstructed under New York law. It was unreasonable to  
23 believe that the sidewalk did not contain members of the media,  
24 passers by, legal observers. That everyone, it was  
25 unreasonable to think, that everyone there, even if you

1 accepted the City's position that they gave conditions to the  
2 marchers, it was unreasonable to believe that everyone on that  
3 sidewalk, at the time that the march was stopped and the group  
4 was surrounded was, in fact, a marcher. It was unreasonable to  
5 believe that the dispersal order which is depicted on the  
6 police videotape number 62, TARU 62, which has that dispersal  
7 order as much as it existed in any way.

8           It is a matter of law that you can decide that that  
9 dispersal order did not, was not designed to enable the 227  
10 people stretching all of the way back to Church street, was not  
11 designed for them to hear it, and did not give the people who  
12 were trapped on that sidewalk sufficient opportunity to respond  
13 to the dispersal order before everyone was arrested. It was  
14 unreasonable to summarily arrest people on that sidewalk  
15 without dispersal orders after having granted permission for  
16 that march to proceed. Even if you accept the City's position  
17 that Galati reasonably believed that the announcement that he  
18 gave amounted to conditions for a march beyond simply saying  
19 you cannot obstruct the sidewalk, even if you accept that, even  
20 if you accept that it was reasonable to believe that everyone  
21 who engaged in the march heard that announcement, even if you  
22 accept that it was reasonable to believe that some marchers may  
23 have even violated those conditions, it was unreasonable to  
24 believe that everyone on the sidewalk when the arrests took  
25 place were in fact the people those conditions were addressed



1 to, accepting their terminology.

2 As to the marchers themselves, accepting the fact that  
3 the police can set certain types of crowd control conditions  
4 and measures, which the City calls conditions, violation is not  
5 an obstruction of governmental administration. And I think  
6 that is adequately addressed in the papers submitted by the  
7 NYCLU on our motions. And you cannot arrest everyone because  
8 you perceive a few people to have violated some kind of  
9 conditions that you have set in order to control the march.

10 Let's look at what happened there from the beginning.  
11 The police knew about this protest. They knew in advance that  
12 this march was going to take place. They knew it was intended  
13 to be peaceful, it was called by a pacifist  
14 organization. They knew that they planned to walk on the  
15 sidewalk to get as close to Madison Square Garden as they  
16 could. They had to know, once they arrived, that what they  
17 were seeing was entirely consistent with what they knew from  
18 their intelligence ahead of time. It was peaceful. There were  
19 no incidents with the police. There was no violence. There  
20 was no -- there was just nothing, except a gathering of people,  
21 and the other people who were there to visit the World Trade  
22 Center site. You see them all on the video.

23 This was a gathering of people to express themselves  
24 on issues of war and peace it attracted members of the media.  
25 You can hear on the videos the police repeatedly addressing the

1 media. They were well aware that they were there. And it was  
2 near a tourist attraction where you can see passersby walking  
3 by.

4 The police then conferred with one of the organizers,  
5 Mr. Hedemann. Everything about that conversation that is  
6 recorded on the videotape is consistent with cooperation with  
7 the police to have a peaceful, lawful march on the sidewalk.  
8 Once that march started -- and it is -- the critical moments  
9 are from the time the march started until it was stopped,  
10 because the conditions on the sidewalk, once the march was  
11 stopped by Monahan and Galati, certainly could not constitute  
12 obstruction --

13 THE COURT: Did Galati stop it?

14 MR. SPIEGEL: Galati says that he did. And he is seen  
15 in that video with his hand on the front pole of this TARU 62.  
16 He's there with Monahan, and puts his hand up to stop the front  
17 pole of the banner. He claims it was a joint decision with  
18 Monahan to stop the march. The person who speaks on the video  
19 is clearly Monahan, the one who seems to be --

20 THE COURT: Well there's a point on the video where  
21 Galati seems to be telling people to move closer to the fence,  
22 or they are not going to be able to go forward with the march.  
23 But he says that after Monahan has already made an order that  
24 people are already getting arrested.

25 MR. SPIEGEL: He does say that. And that's very

1 confusing. He later claimed in a deposition that he had  
2 participated in the decision, jointly.

3 What's strange about -- what is unreasonable and --  
4 strange and unreasonable about the circumstances, is that the  
5 defendants now claim that despite everything they knew about  
6 that march when it started, that once people stepped onto the  
7 Fulton Street sidewalk, the marchers gave up their intent to  
8 get as far as Madison Square Garden, lawfully. The media gave  
9 up their intent to observe what was going on. And any  
10 uninvolved passersby decided to stop being uninvolved and then  
11 collectively these people decided to join together to obstruct  
12 the sidewalk. That is an unreasonable conclusion. There is  
13 not a single iota of evidence that supports it.

14 Monahan and Galati had to have known that there were  
15 pedestrians and media on that sidewalk. And the best evidence  
16 is the video. If you look at the videos taken before the march  
17 begins. For example, the Burns video, who is one of the  
18 marchers. He is on the west side of Church Street, amongst the  
19 marchers. And in about a minute and 30 seconds in, he holds  
20 his camera up and you can see the other side of Church Street.  
21 There are, literally, dozens of people walking on the Fulton  
22 Street sidewalk, up and down Church Street and around the  
23 corner, on both sides of the Fulton Street sidewalk, before the  
24 march begins. After the march begins, you can hear on that  
25 same Burns video Monahan's distinctive voice telling media to

1 get out of the street, onto the sidewalk. He, at no point,  
2 says that anything is going on on that sidewalk which  
3 constitutes illegal activity. There is no linking of arms,  
4 there is no chanting in unison, there is no -- there is no  
5 evidence, whatsoever. The most that the City says is that they  
6 observe -- Monahan says that he observed pedestrians up the  
7 block, cross from one side of the street to the other. Which  
8 brings to mind, if I may inject a joke, the chicken crossing  
9 the street. Who knows, there are a million answers to the  
10 joke, there are a million answers to why people could have  
11 crossed the street up the way, and it certainly does not  
12 constitute evidence that the people who were on the sidewalk  
13 were obstructing.

14 So the police had to know, not only were there media  
15 there, because they were talking to them, they could see them.  
16 We have given a number of videos made from the sidewalk by  
17 people who were there as you see the march come across. So  
18 they were on the sidewalk. There were pedestrians on that  
19 sidewalk, completely uninvolved. You see them -- if you look  
20 at the Judd, or Volpe, or Turner videos, you see someone, those  
21 people with their video cameras, on the east side of Church  
22 Street, on the Fulton sidewalk, and you see pedestrians  
23 crossing the crosswalk walking onto the Fulton Street sidewalk.  
24 You have the police talking to Mr. Hedemann on videotape about  
25 their concern that they not obstruct pedestrians. So they

1 certainly had in mind that there would be pedestrians on that  
2 sidewalk when the march was stopped.

3 They, the defendants, do not describe any conduct that  
4 would constitute obstructing the sidewalk. In addition to the  
5 fact that you had other people, they do not describe any  
6 activity that actually falls within New York law constituting  
7 obstruction of the sidewalk.

8 Every single video shows a crowded, typical, New York  
9 City sidewalk that pedestrians could pass by on. There is no  
10 indication that it violates the clearly-established law under  
11 New York Court of Appeals decisions under Jones vs. Parmley  
12 regarding what constitutes obstructing the sidewalk. There is  
13 not an iota of evidence that that sidewalk was ever obstructed  
14 by anyone.

15 THE COURT: Well, one of the ground rules was, one or  
16 two abreast before the thing started -- maybe you're going  
17 there. And so -- so that was one of the ground rules. And  
18 don't block intersections, you have to obey traffic lights,  
19 correct?

20 MR. SPIEGEL: So let's assume -- I don't -- I don't  
21 know that that exactly -- I don't think that took place, I  
22 don't think that is what is shown --

23 THE COURT: What do you mean that that was what took  
24 place, that was one of the conditions.

25 MR. SPIEGEL: No, I think the police are permitted to

1 set crowd control conditions. Can they summarily arrest an  
2 entire group of 227 people because they claim they perceive  
3 someone crossing the sidewalk, the crosswalk improperly?  
4 Because they have set a condition that people walk two by two,  
5 as they walk by a member of the media it looks like three,  
6 let's assume that they are right, that it is three marchers.  
7 Maybe they have probable cause at that point. I don't think  
8 so --

9 THE COURT: Probable cause --

10 MR. SPIEGEL: -- but the argument would be to arrest  
11 the individual, but not 227 people. It cannot be the basis for  
12 arresting an entire group of people because they perceive that.

13 I think we get into a First Amendment problem when we  
14 are -- which we're not here to address really today, we're here  
15 to address the 4th Amendment problem, about a demonstration in  
16 which you set such conditions. And then, without fair warning,  
17 think you can start arresting people, anybody, without giving  
18 them some kind of indication that the crowd control conditions  
19 are not being met.

20 THE COURT: Right. And I'm not sure if you are going  
21 to talk about the Seventh Circuit Vodak case or not, is that  
22 one that you were going to touch on?

23 MR. SPIEGEL: Your Honor, I -- I don't think -- I  
24 think that -- in terms of which aspect? In terms of the  
25 permission to march?

1 THE COURT: Well, just in terms of the --

2 MR. SPIEGEL: I mean, there, you had the police  
3 directing people down city streets. Here, we have people  
4 walking on the sidewalk which we don't believe requires a  
5 permit. In any event, the announcement fairly gave people  
6 permission to walk.

7 With respect to -- I just don't think that -- that  
8 there is any -- the problem we have on Fulton Street is there  
9 is no underlying the illegal conduct. And, then, they can't  
10 possibly have believed, reasonably believed that there were not  
11 people who were not involved in the march, to the extent that  
12 they consider them marchers, to have been some kind of group of  
13 people would were not honoring conditions, they say.

14 Was there an issue regarding Vodak that you want --

15 THE COURT: I think it probably helps your position.

16 MR. SPIEGEL: I think it does, too, but the march in  
17 Vodak, the police gave dispersal orders. It seemed to me that  
18 was the underlying conduct that they found illegal. And that  
19 the people -- that they then arrested a large number of people,  
20 and the question was whether or not everybody could have  
21 reasonably heard it. Here, I don't think that the dispersal  
22 order really -- it's a sham what Monahan did on the street that  
23 day. That was no dispersal order that anyone could have  
24 possibly have responded to, and it's impossible that any group  
25 of people, beyond the first few in front of him, could have

1 heard it.

2 Your Honor, I'm gonna let Mr. Moore address the 16th  
3 Street facts at this time, unless you have any other questions.

4 THE COURT: No, I don't, actually, so.

5 16th Street seemed very, very different than Fulton  
6 Street.

7 MR. MOORE: That's fair to say, Judge.

8 Judge, we represent the class in MacNamara, so we have  
9 plaintiffs in both locations. I just want to make sure the  
10 Court understands we join in the arguments made by Mr. Dunn and  
11 Mr. Spiegel.

12 THE COURT: No, these are divided up just for purposes  
13 of today's hearing.

14 MR. MOORE: I think your comment about Vodak is  
15 important, because I think Judge Posner pointed out that, and  
16 he says: No precedent should be necessary to establish the  
17 fourth Amendment meant does not permit the police to say to a  
18 person, go ahead and march. And then five minutes later,  
19 having revoked the permission for the march without notice to  
20 anyone, arrest the person for having marched without police  
21 permission.

22 And I think it's -- you could argue that that is  
23 exactly what -- that is at least in part what happened at  
24 Fulton Street. So just in terms of responding to your point  
25 about Vodak.



1 I do want to address --

2 THE COURT: Maybe not five minutes, but --

3 MR. MOORE: Actually, it was shorter than five  
4 minutes.

5 THE COURT: Seems to me about 90 seconds.

6 MR. MOORE: The point that Judge Posner is making in  
7 Vodak applies to the full force of these cases.

8 It is true --

9 THE COURT: No, but the point Mr. Spiegel is making is  
10 that there was -- he is suggesting there was no illegal  
11 activity at Fulton. There is clearly some illegal activity on  
12 East 16th, right --

13 MR. MOORE: Well --

14 THE COURT: You are not suggesting that --

15 MR. MOORE: That's --

16 THE COURT: -- anybody can just throw a parade on the  
17 middle of a city street in mid day, right?

18 MR. MOORE: No, I'm not suggesting that.

19 I think 16th Street does present a different set of  
20 facts for the Court to consider.

21 I still think that the issue is the same, whether the  
22 facts would have been -- whether a reasonably prudent police  
23 officer would have concluded, based upon what they saw at the  
24 time they decided to arrest this group, that everybody in that  
25 group was engaged in unlawful behavior. And I think if you --

1 you said you watched the videos, you read the submissions. I  
2 don't think you can -- any reasonably prudent police officer  
3 could conclude, having gone through that, seen those videos,  
4 having witnessed on what happened on 16th Street, that  
5 everybody being arrested was engaged in unlawful behavior. And  
6 that's the important point.

7 Carr and Bernini, to the extent that they have any  
8 applicability in the Second Circuit, carved out a very limited  
9 exception to the Fourth Amendment requirement for  
10 individualized probable cause.

11 There is, in fact, no principle that I don't think any  
12 Court has ever endorsed of group probable cause. What Carr and  
13 Bernini say, that under certain unique circumstances, you can  
14 infer from what you are observing that everybody engaged in a  
15 particular activity understands that it is unlawful activity.  
16 And you just can't get that from looking at what happened at  
17 16th Street.

18 And in the absence of that, in the absence of a  
19 reasonable belief that everybody arrested on that evening on  
20 16th Street was engaged in unlawful activity, you can't sustain  
21 this probable cause theory based on group probable cause that  
22 the defendants urge this Court to do. This case is simply not  
23 Bernini or Carr. Those were unique factual situations that the  
24 court dealt with. And I think if you look at what Judge  
25 Silberman said in the rehearing decision in Carr, he said to

1 caution everybody: This is not the situation where you have an  
2 undifferentiated mass of people who happened to be in proximity  
3 to unlawful behavior. That would not sustain a theory of  
4 arresting everybody. And that's --

5 THE COURT: Well, what he said, and it's really dicta,  
6 but is that Carr does not permit the police to arrest  
7 undifferentiated groups of marchers and bystanders, with no  
8 effort to separate the two.

9 MR. MOORE: Right.

10 THE COURT: Now, there is some evidence, or some  
11 evidence that there was an effort to separate the two. That  
12 some officers were sent through the crowd to try to give  
13 dispersal orders, and to tell people if they want to get out of  
14 here, they better get out now. Not a lot of detail, not a lot  
15 of flesh on those bones. But there is at least some evidence  
16 in the record about that.

17 MR. MOORE: Let me say two things about that. First  
18 of all, that would have come after Chief Essig had concluded  
19 that he was going to arrest everybody on that street, who was  
20 on that street who was inside the mesh. Because he concluded,  
21 as he was going -- once he saw this group -- and he says this  
22 at his deposition. He concluded, once he saw the group cross  
23 Union Square East into 16th Street, that everybody was gonna be  
24 arrested. So that's why he didn't give any orders to disperse  
25 when he got on 16th Street. He says that in his deposition, he

1 is -- on page 744 -- which is a good reason why depositions  
2 should go on for a long time. But he says: The people were  
3 going to be arrested once they left Union Square and paraded  
4 without permit.

5 That's what he says. And the question was: So there  
6 would have been no reason to give them an order to disperse?

7 Answer: That is right.

8 So it's curious, I think, that the City now attempts  
9 to defend the conduct of the police at 16th Street based upon  
10 the effort that Johnson in Cortright made to try to determine  
11 whether some people should be asked to be given information  
12 that they could leave. It seems clear to me from having read  
13 both those depositions -- and we have provided excerpts to the  
14 Court -- that they were really concerned about the business  
15 people, and closing the garage door -- there was a big garage  
16 on 16th Street. That there was really no effort to, as there  
17 was in Bernini, to determine whether in fact, bystanders, other  
18 people who were simply on the sidewalk -- even if you are not a  
19 bystander, if you are on a sidewalk not obstructing anything,  
20 you have a First Amendment right to watch what is going on even  
21 if it is going on on the street.

22 So you have seen the videos. I mean there are --  
23 there are hundreds of people on the sidewalk. Yes, there are  
24 people on the street. But the fact that the police arrested  
25 everybody, does not --

1           THE COURT: I don't know that -- it's not clear from  
2 the video the police arrested everybody. In fact, it is -- the  
3 arresting that's going on is very hard to distinguish whether  
4 some people are not arrested who were on the street and  
5 watching, or having a cup of coffee.

6           MR. MOORE: That's my point, Judge. It's very hard to  
7 tell where these people came from. So no reasonable police  
8 officer would have been able to discern that at the time. You  
9 can't tell whether the person you are arresting was simply  
10 walking down the street, was a journalist, was a legal  
11 observer, was a bystander, was somebody actually engaged in  
12 First Amendment expression even if it was on the street, even  
13 if it was not a permitted march. The fact that you can't  
14 determine that, is fatal to the City's argument.

15           Notice and an opportunity to disperse which the Barham  
16 Court, the Dellums Court, Vodak, all stressed, and even Jones  
17 vs. Parmley, is very important. I mean we would argue that  
18 given the First Amendment activity, that you would, before you  
19 can arrest for these violations, disorderly conduct, parade  
20 without a permit, that you have to give notice. But even  
21 setting that aside, notice was important on the issue of  
22 probable cause. Because it would have given the police some  
23 belief that the people who were there after notice and an  
24 opportunity to disperse was given were, in fact, engaged in  
25 unlawful behavior.

1 Have I reached my 10 minutes?

2 THE COURT: No, you have a couple of more minutes.

3 MR. MOORE: Okay.

4 And that simply wasn't the case. If you look at  
5 the -- if you look at the video -- and we provided sort of a  
6 time-stamped compilation. The crowd left Union Square Park at  
7 6:58. That is when the band started marching. At 7:01, they  
8 were diverted onto 16th Street. At 7:02, the line closes at  
9 16th Street by the police so that nobody -- I mean I'm not  
10 saying some people didn't get out. But for all intents and  
11 purposes that -- that police put a line across the street,  
12 building to building, and not letting people out and not  
13 letting people in. They did the same thing at Irving Place --

14 THE COURT: Well, the same thing happens in Bernini.  
15 Basically, what happened in Bernini, was there was an attempt  
16 to discern who had been part of the unit at the intersection  
17 and who wasn't. So it was not an indiscriminate arrest, it was  
18 there was an attempt to make some separation.

19 MR. MOORE: Well there's two things about Bernini.  
20 First of all, the conduct here that was happening on 16th  
21 Street was nothing close to what was happening at Bernini.

22 THE COURT: Well, if your loved one was waiting for  
23 the ambulance to come, you might feel differently, right?

24 MR. MOORE: Well, there is no evidence --

25 THE COURT: Well, my point is that's what the police

1 are charged with, it's making sure that emergency vehicles and  
2 others can get through. And a parade by -- staged by people  
3 who didn't care about that -- I guess it depends on whose ox is  
4 being gored. But if you are the one waiting for the ambulance,  
5 you would be unhappy about the impromptu parade.

6 So I'm not sure that Bernini or Carr turn on the fact  
7 that there were riots, or baseball bats, or torches in one  
8 case, and merely a parade with xylophones and drums in the  
9 other.

10 MR. MOORE: Right, not I understand that. And I think  
11 that the point I'm trying to make is the police had a  
12 legitimate interest in clearing the street so that people could  
13 come by. And if you look at the videos, at least on Union  
14 Square East the traffic was moving within you know, certainly  
15 by 7:06 because certainly by 7:10, that's when arrests start.  
16 So all of this took place in the course of 12 minutes. And  
17 there is no doubt there -- and we don't take the position that  
18 the police didn't have an interest in responding to what was  
19 happening. The question becomes, having responded, having  
20 dealt with the crowd control situation, having gotten the  
21 people off the street onto the sidewalk -- and it's there in  
22 the video. You see people coming back. They are coming back  
23 on the sidewalks. And that's where they are arrested, on the  
24 sidewalks. But having done that, then having trapped everybody  
25 who was now cleared off the street in the sidewalks and

1     arresting everybody without regard to why they were there or  
2     how they got there, is unreasonable under any definition of the  
3     Fourth Amendment, that that decision is the one that violates  
4     the Fourth Amendment. Because no reasonable police officer  
5     would have, or could have, concluded that everybody who was  
6     then trapped between those two orange mesh nets on either side  
7     of 16th Street had engaged in unlawful behavior. And that's  
8     why notice and an opportunity to disperse are critical in this  
9     context. And, in fact, as we pointed out in our briefs, that's  
10    how the police are trained, that's what Essig said his training  
11    was, that you give notice and an opportunity to disperse. He  
12    said he carried a card with the script for what you say to a  
13    crowd when they are engaged in that kind of conduct. And in  
14    fact, that is how the defending -- the Brooklyn Bridge arrests.  
15    And we provided you with the brief of the City in that case  
16    where 700 people marched onto the Brooklyn Bridge, clearly a  
17    much more vital artery, traffic artery, than 16th Street  
18    between Union Square East and Irving Place. And they defended  
19    that case by saying we did it right; we gave notice, we gave an  
20    opportunity to disperse, clearly heard by people. This  
21    situation that the police were presented with at 16th Street  
22    just did not give them the right to simply arrest everybody.

23           And so, on that basis, we would urge that the Court  
24    grant summary judgment as to 16th Street.

25           Unless you have any other questions, I'll --



1 THE COURT: No, I'm good. I'm going to stop the clock  
2 for you.

3 MR. MOORE: I do want to respond at the end to the no  
4 summons issue, so I'll wait until that comes up.

5 THE COURT: Okay, so you folks have about, I think, 19  
6 minutes left. Good.

7 All right, Mr. Farrell, you are going to carry the  
8 ball on the first part, right?

9 MR. FARRELL: Yes, your Honor.

10 My plan is to address the issues, and if there is a  
11 question that I think I need some assistance on, I will turn to  
12 some of my colleagues at the table.

13 THE COURT: Okay.

14 MR. FARRELL: First thing I would say is that, in  
15 terms of sending a message, which is what plaintiffs' counsel  
16 had asked this Court to do, I think that the message of the RNC  
17 was -- the undisputed message was that 800,000 people  
18 demonstrated without arrests. And only 1800 people were  
19 arrested. On a percentage basis, that's less than point  
20 2 percent of protestors or demonstrators who were arrested. So  
21 I think that's the message that should be realized.

22 THE COURT: I'm not sure what I'm supposed to take  
23 from that?

24 MR. FARRELL: Well, I'll --

25 THE COURT: What's a couple of percent, even if it was

1 wrongful?

2 MR. FARRELL: I think it's clear that the City was  
3 facilitating First Amendment activity when it was lawful,  
4 and --

5 THE COURT: Well, wait. Wait, wait. Look, I think  
6 that any objective observer could say that, overall, the City  
7 did a good job; nothing blew up and people were able to  
8 protest. It was -- it came off okay. But that's not the  
9 issue. The issue is, from that, I'm to presume that any arrest  
10 they did make was an okay one, because they were -- they only  
11 arrested 1800 out of 800,000?

12 MR. FARRELL: No, that's not what I'm asking the  
13 Court --

14 THE COURT: Good. I didn't think you were. So but I  
15 don't think that's an argument. That seems to be more designed  
16 for press consumption.

17 So let's talk about the issues in this case. Because  
18 I'm not really interested in sending messages, generally.  
19 That's for politicians to do. My interest is just making sure  
20 I get the law right, and that I can understand the facts.

21 MR. FARRELL: All right. Well, contrary to what  
22 plaintiffs have argued here today, the law regarding when the  
23 police -- when probable cause exists to arrest a group, was not  
24 settled in 2004 during the RNC. All of the cases Carr,  
25 Bernini, Papineau which they refer to as Jones v. Parmley, all

1 were decided after 2004. That's the first issue.

2 The second issue is that Carr and Bernini made clear  
3 that when a group is acting as a cohesive unit, it can be  
4 arrested as a unit and that probable cause can exist.

5 The second thing is that Carr and Bernini made clear  
6 that violence is not a prerequisite to making an arrest of a  
7 group. Specifically, Carr states in addressing the legal  
8 standard, that groups can be arrested when they are engaged in  
9 violence or obstruction. That language is explicitly in Carr,  
10 it goes back to Washington Mobilization v. Cullinane, which is  
11 DC Circuit case. And the facts in Bernini were -- not only  
12 were the individuals there subject to violence, but they also  
13 were being charged with unlawful assembly. And in Minnesota,  
14 that statute does not require violence, it only requires,  
15 quote: That the participants so conduct themselves in a  
16 disorderly manner as to disturb or threaten the public.

17 So the first three premises that violence is required  
18 to make a group arrest is contrary to the established case law  
19 in Carr and Bernini --

20 THE COURT: I agree with you on that, so what are the  
21 other two; the other two points you were making?

22 MR. FARRELL: That you can arrest a cohesive group as  
23 a unit --

24 THE COURT: If you have a reasonable belief that  
25 everybody you arrest is part of that unit and is engaged in

1 unlawful activity, right? It can't just be that there is a  
2 group here, they are all wearing red shirts and they are  
3 engaged in obstructive behavior, so we're taking out the whole  
4 block, including everybody who is wearing a blue shirt and a  
5 striped shirt, right?

6 MR. FARRELL: That's not what I am suggesting, your  
7 Honor.

8 What I'm suggesting is that the case law, Carr and  
9 Bernini, made clear that when the group is acting as cohesive  
10 unit and the group as a whole is engaging in either a parade,  
11 without a permit, or an obstruction of pedestrian vehicle  
12 traffic, that there is probable cause exists to arrest that  
13 group or, at a minimum, the officers would be entitled to  
14 qualified immunity as the Court found in Bernini.

15 THE COURT: All right, but here's the situation.  
16 Let's use a hypo and come back for actual.

17 So you've got a group determined to obstruct traffic,  
18 and conducting impromptu, unpermitted parade on Broadway, right  
19 through Times Square. There is 200 of them and that's what  
20 they are doing. You are not suggesting that you can then just  
21 cordon off the block and arrest all 500 people who happen to be  
22 on that street because it's 5:00 p.m. on a Thursday in the  
23 middle of Times Square. You are not suggesting that, right?

24 MR. FARRELL: No. We're not suggesting that, your  
25 Honor. In fact, the example that your Honor gives, is the

1 cases where the correspondent is not a cohesive unit. That  
2 would be an example --

3 THE COURT: No, it's a very cohesive unit.

4 MR. FARRELL: No, it's --

5 THE COURT: Clearly, cohesive unit is the people who  
6 are obstructing traffic. The issue is whether the police have  
7 done enough to make sure they are only arresting the cohesive  
8 unit and not everybody else who happens to be in the vicinity.

9 MR. FARRELL: I agree with you, your Honor. I think  
10 it's a two-step process. One is I think you need to identify a  
11 cohesive unit, that there is a cohesive unit. And the second  
12 step is to ensure that you reasonably believe that the people  
13 you place under arrest were part of the cohesive unit and not  
14 some other people who were in the vicinity. I think that is  
15 the two-step process that the case law discusses. And at both  
16 locations, at Church and Fulton, and at 16th Street, the City  
17 and the individual defendants satisfy those requirements.

18 THE COURT: How so? Let's talk about Fulton Street.

19 MR. FARRELL: All right. And I just want to state  
20 that this is framework that we're discussing about the facts  
21 and about the law, is we've moved for probable cause -- there  
22 was probable cause existed to grant summary judgment. Or that  
23 there was -- that we are entitled to qualified immunity, which  
24 means either the law was not clearly established or that there  
25 was arguable probable cause. So the discussion we are about to

1 have about the facts and the law, I'm going to do in addressing  
2 both of our parts of our summary judgment motion.

3 THE COURT: Okay, that's fine. But I do think you  
4 have to be very careful not to say that because Carr and  
5 Bernini had not been written yet, that it was reasonable to  
6 believe that if you have a couple of hundred people who you  
7 think are violating the law, you get to sweep up 500 because  
8 they are nearby.

9 MR. FARRELL: Again, that's not what I'm suggesting.  
10 The question is what were the parameters of when you  
11 can make a group arrest, were they clearly established at the  
12 time.

13 Before I go into the facts, I would like to address  
14 one other point that one of my adversaries made, and that had  
15 to do with this issue of, you know, they argue that what was  
16 clearly established was that you needed individualized probable  
17 cause. That's not what we are here to discuss and that's not  
18 what we are saying.

19 What we believe the qualified immunity test is going  
20 to is when you can make an arrest of a group. Not whether you  
21 need individualized probable cause. Nobody disputes that,  
22 quote, you need probable cause to arrest individuals. The  
23 question is, when you have a group setting and you have the  
24 practical realities faced by police officers dealing with  
25 disorderly groups, large -- large number of people, under what

1 circumstances does the Police Department have probable cause to  
2 make the arrest. And that is the question that it was not  
3 settled. And the qualified immunity law clearly states, you  
4 don't deal with generalities -- generalisms, I guess I'll say,  
5 since I can't get the word out -- that you need probable cause  
6 to arrest. Nobody disputes they need probable cause to arrest.  
7 It's the more specific question and the qualified immunity case  
8 law says the more specific question of under these  
9 circumstances when you have a large disorderly group, when can  
10 you make the arrest. That is the question, not the way it was  
11 defined by my adversary.

12 THE COURT: Wait a minute. I mean I think the issue  
13 is if it was clear to a reasonable officer that we are making  
14 an arrest here and we're going to clear this street, but we're  
15 gonna have a lot of tuna and we have a lot of dolphins in the  
16 same net, but we'll sort that out later when we get them to  
17 Pier 57. You are suggesting that that was a reasonable, and  
18 that was a qualified immunity-able position --

19 MR. FARRELL: No, your Honor.

20 THE COURT: -- in 2004?

21 MR. FARRELL: I'm not -- the City's position in this  
22 case is not that they swept up a large undifferentiated group  
23 and brought them to Pier 57. The City's position, and I will  
24 go through the facts to show you, that at both locations, it  
25 perceived a cohesive unit that was engaged in a parade. If

1 there is anything that's cohesive, that is an easily cohesive  
2 identifiable unit, that is a parade, that certainly I would  
3 think is more identifiable as a cohesive unit, everyone's  
4 travelling in the same direction, marching together --

5 THE COURT: You've got media folks who are aside them,  
6 people walking parallel with them because it is an open  
7 roadway, or it's a thoroughfare, and you have some people who  
8 are just watching. You are saying you get to arrest all of  
9 those folks, too?

10 MR. FARRELL: What I'm saying is that someone's status  
11 as a legal observer as media or something else, if they are  
12 engaging in the unlawful conduct, and the police observe that  
13 person engaging in it, their status as a media or legal  
14 observer doesn't change the analysis. In fact, in Bernini, the  
15 Eighth Circuit specifically said, hey, we know that plaintiffs  
16 here claim they were held in the status of legal observer or  
17 media or some other title, but that doesn't change the  
18 reasonableness of the officers' perception that they were all  
19 engaged in unlawful conduct. That's the explicit language  
20 found in Bernini, they say that the title of legal observers  
21 and media do not change it.

22 And I will also say at both of these locations, that  
23 the police took reasonable steps, once the groups were cordoned  
24 off, to make sure that they only had the individuals who they  
25 perceived were engaging in unlawful conduct.



1           So I'm going to go into that. And I would just like  
2 to draw the Court's attention, before I do that, to the Carr  
3 case when it comes to this issue of the personal knowledge  
4 orders that were referenced earlier. Carr, I'm quoting from  
5 Carr, it says: The officer need not see everyone individually  
6 in the crowd. Police witnesses must only be able to form a  
7 reasonable belief that the entire crowd is acting as a unit  
8 and, therefore, all members of the crowd violated the law.

9           THE COURT: Right.

10          MR. FARRELL: So it's that -- the DC Circuit disagrees  
11 with plaintiff counsel's argument --

12          THE COURT: I'm not sure. Are you saying, are you  
13 disagreeing with that characterization? I think the issue is  
14 whether or not you've got folks at sidewalk cafes that are  
15 subject to the same arrest order as the people who are marching  
16 in the street and on the sidewalk.

17          MR. FARRELL: All right. Well, if plaintiffs are  
18 conceding that that's their argument, then I'll move past it,  
19 and go to the facts to show why people, it was reasonable for  
20 the officers at two locations to believe that they had in fact  
21 arrested the unlawful group.

22          All right, so the first question, as we agreed upon,  
23 is whether these two groups could be perceived as cohesive  
24 units, versus an undifferentiated group. The undifferentiated  
25 group is the type of group that is in the Barham case, DC case

1 where there were people in a park, outside the park, there had  
2 been a couple of people engaged in unlawful conduct. They  
3 then, the police observed that unlawful conduct of those  
4 individuals, those individuals then came into the park and the  
5 police then observed the park for an hour after that and  
6 watched other people come and go and intermingle and comingle  
7 with that group. That is an instance where you have an  
8 undifferentiated group.

9 At Church and Fulton, the facts that support treating  
10 this as a cohesive unit, were that this was a march organized  
11 by the War Resistance League. These are all undisputed facts,  
12 that the NYPD discussed the march before it began with the War  
13 Resistance League's -- a person who was organizing it, Ed  
14 Hedemann, who is a plaintiff in these cases. Hedemann tells  
15 the NYPD, and it's in the videotapes, on the videotapes, that  
16 the group will follow the directives that they had been given,  
17 and that he has designated either marshals or peacekeepers who  
18 will make sure the group does so.

19 So you have the War Resistance League there. They  
20 sent out, put a notice out, said: Hey, come down to Church and  
21 Fulton, we're gonna have an unpermitted march. Flier said it  
22 was unpermitted, they had no permit for it. Several hundred  
23 people show up. This is on Tuesday afternoon at 4:00, during  
24 rush hour. And, now, the police are there speaking with them.  
25 The police offer the War Resistance League an alternative route

1 up Church Street, because it goes with the flow of traffic.

2 The War Resistance League rejects that offer. The War  
3 Resistance League tells Galati, no, I do not want to go that  
4 way. I want to go up, northbound, on Broadway. Police say:  
5 Hey, if you are going to do that, we can't sanction it, you'll  
6 be subject to arrest if you violate the rules.

7 He says: Fine, we'll take care of it, I have people,  
8 we'll follow the rules.

9 Galati tells Hedemann what the rules are. You have to  
10 be single file or double file; you can't cross against the  
11 traffic lights; you can't block vehicles or pedestrian traffic;  
12 and you can't turn that banner that you plan on having in the  
13 front of the march horizontally to block the sidewalk. He  
14 says: Fine, we agree to that, and we'll make sure that that  
15 happens.

16 Then the NYPD makes an announcement to the group.  
17 Chief Galati, over the bullhorn, makes an announcement, warns  
18 the crowd that these are the three or four things that you need  
19 to do and specifically tells them: Otherwise, you will be  
20 subject to arrest. I must warn you, you will be subject to  
21 arrest if you violate these rules.

22 THE COURT: Right. But there is some question as to  
23 whether everybody heard this. In fact, on some of the  
24 videotapes, you can loudly hear people saying: Can't hear you,  
25 so --

1 MR. FARRELL: You hear that on some of the videotapes.  
2 The question is whether it was reasonable for the NYPD to  
3 believe that everybody had heard these warnings. And, in fact,  
4 Chief Galati orders one person to go through the back of the  
5 crowd, over a bullhorn, and make the announcements a second  
6 time, which happens, and is captured on the videotapes  
7 submitted to the Court.

8 In addition, he sends a different officer down the  
9 line of the crowd to make oral announcements about the  
10 conditions. The fourth thing that happens is once the crowd  
11 starts to cross the street, there is an officer standing there  
12 with the bullhorn warning the group that if they violate the  
13 law, they are going to be subject to arrest.

14 THE COURT: No, he didn't say you are all going to be  
15 arrested if one of you gets out of line, right? Nor could he,  
16 do you think? That wouldn't be reasonable, would it?

17 MR. FARRELL: No, but what this is indicative of is  
18 that from the Police Department's viewpoint, that it was  
19 reasonable for them to believe the group that had been there to  
20 assemble to engage in a march, understood the warnings,  
21 understood that if they violated the law that they were going  
22 to be subject to an arrest, and that they were gonna proceed  
23 under that -- within that framework.

24 THE COURT: No, but I think to arrest them all, you  
25 have to be able to reasonably believe that they all intended to

1 violate the law, right? If everybody crosses the street with  
2 the light, and there is 12 stragglers who cross against the  
3 light in violation of, obviously, the local law, those 12 can  
4 be arrested. But you're suggesting you can arrest everybody  
5 because of the 12 who crossed against the light?

6 MR. FARRELL: I'm not saying that. I'm saying whether  
7 it was reasonable for the police officers to view that that  
8 march was in violation of the law as a unit.

9 The other thing that they warned them of was that  
10 there was no permit for that march. And they said you do not  
11 have a permit for this march, it is an unpermitted march.

12 THE COURT: Right. Again, they are on the sidewalk,  
13 proceeding two by two. And so you are saying they needed a  
14 permit for that?

15 MR. FARRELL: Well, that's -- the separate legal part  
16 is what you need a permit on the sidewalk. And we would --

17 THE COURT: Two by two on the sidewalk, you are saying  
18 you still need a permit?

19 MR. FARRELL: I'm saying that under the Section 10-110  
20 of the Administrative Code, if a police officer perceived that  
21 that's a parade, a procession, or a race, yes you do. You do.  
22 That's what that statute says.

23 THE COURT: But police here clearly said you can march  
24 by two by two, right?

25 MR. FARRELL: They said if you -- you have to march

1 single file, or two by two. So I mean they were making -- in  
2 essence, the police were trying to make an effort to say, hey,  
3 you want to go, you can try and go, but you are subject to  
4 arrest if you don't do these things. And they told them you  
5 don't have a permit, once the group as unit didn't do those  
6 things, they were subject to arrest for all the statutes --

7 THE COURT: All of the people were subject to arrest,  
8 once one person --

9 MR. FARRELL: And the reason is the video --

10 THE COURT: -- people cross --

11 MR. FARRELL: If you look at the videotape, from the  
12 time that the march steps off, they violate all of the rules.  
13 The march starts, the minute they step off the curb to cross  
14 Church Street, nobody is single file or two abreast. You see  
15 on the videotape a mass of people proceeding across Church --

16 THE COURT: I disagree with that, I watched it. I  
17 disagree. What you do have is a lot of media people walking  
18 alongside them. Your view is the media people were marching as  
19 part of the parade, part of the group?

20 MR. FARRELL: The police officers are not  
21 differentiating who is there participating.

22 THE COURT: Wait a minute. You just said the first  
23 issue is whether or not this is a group that is working  
24 collectively, right? So the media people are taking pictures  
25 of people who are walking two by two. You are saying that the

1 police officer then has a reasonable belief that the entire  
2 group is violating the law?

3 MR. FARRELL: If I -- when you say media, if I show up  
4 with a camera and I'm participating in the march, I mean,  
5 who -- who are we discussing is media?

6 THE COURT: Press credentials.

7 MR. FARRELL: Right. If you have press credentials --

8 THE COURT: Lou Young, if you want to ask him, he was  
9 standing next to people who were walking two by two. You are  
10 saying he was part of the group and, therefore, his violation  
11 of the guidelines set by officer -- by Inspector Galati  
12 subjected the entire group to an arrest?

13 MR. FARRELL: No.

14 THE COURT: No. Okay.

15 MR. FARRELL: Press credentialed people were in fact,  
16 the testimony shows, Monahan testified, there's no dispute over  
17 it -- were let out of the group once it was stopped.

18 THE COURT: That's a different issue. I'm talking  
19 about the issue as to whether they could engage in acts that  
20 would constitute the violation that you think was enough to  
21 prompt the arrest of everybody.

22 MR. FARRELL: I think the Eighth Circuit recognizes  
23 that, you know, from -- police officers, they don't -- if the  
24 police don't recognize they're media -- or, again, if they are  
25 violating the law, participating in unlawful conduct, I don't

1 think there is an exception. But I think the Bernini Court  
2 said when the Police Department is looking at a group of -- in  
3 Bernini, it was two to four hundred people, depending on what  
4 point you wanted to look at it. The Court said 10 people who  
5 are media or legal observers had been arrested as part of that  
6 group, does that change the analysis? And the Court says, no,  
7 it does not change the reasonableness of it.

8 In Bernini, what happened, was you had, across from  
9 the -- the City of St. Paul, the Police Department was trying  
10 to keep this group out from entering the City. There were a  
11 group of 50 people across from them on the sidewalk. And the  
12 Court says -- this is on videotape. Fifty people across on the  
13 sidewalk. Next to that group, there was approximately 50 more  
14 people. Fifteen people within the center group step out into  
15 the street and challenge the police. They are driven back into  
16 the main group. At that point, the police are outnumbered, so  
17 they drive the group west. As the group heads west, it  
18 increases in size to the point where they finally march it a  
19 half mile away, and they turn it into a park. The police then  
20 detain everybody in the park, 400 people. It's undisputed in  
21 Bernini -- that there were a hundred people down where the  
22 unlawful conduct was observed. That was with that unlawful  
23 conduct that the group was going to be placed under arrest.  
24 The group then marched a half mile, went into a park. Now, the  
25 group is up to 400 people. The police then make an effort to



1 sort through who entered the group during the march westbound  
2 and who also was in the park, versus the people that they  
3 believed were part of the group that had been across from them  
4 down at the main intersection. They do that sorting process.  
5 They then arrest a 160 people; 160 people, they arrest. The  
6 Court says, undisputed fact show when you go to the videotape,  
7 there were only a hundred people across from them when they --  
8 at the time the unlawful conduct took place. So in Bernini,  
9 they arrested 50 percent more people than were present when the  
10 unlawful conduct took place. And the Court says on those  
11 circumstances, because the officer's viewpoint that he couldn't  
12 see the depth and size of the crowd, it was still reasonable  
13 under those circumstances for the arrest of a 160 people. And  
14 what I am saying to you is, at Church and Fulton, by  
15 plaintiff's own admissions, every single one of those people  
16 was there to engage in a march. This was not an instance where  
17 you have a hundred of those people saying, hey, you know what,  
18 I wasn't there for the march. We went through all of the  
19 testimony, including our declaration, and we have identified  
20 only three people out of 221 who claim they were not there to  
21 participate in the march.

22 THE COURT: I don't think that's the issue.  
23 Participating in a march is not unlawful, per se. It's --  
24 right?

25 MR. FARRELL: No, the march turns to be unlawful

1 because --

2 THE COURT: Because why?

3 MR. FARRELL: The group, as a unit, did not follow the  
4 warnings that the Police Department had given them.

5 THE COURT: The group, as a unit? You can hear on the  
6 tape some people in the march saying don't block the roadway to  
7 other people who are following. So that clearly, the intent,  
8 the collective intent was not to violate the local traffic law.

9 MR. FARRELL: The intent from the police officer's  
10 perspective is what is at issue. It wasn't reasonable for the  
11 police officers to believe, could they infer from the conduct  
12 of the group that this group intended on violating the  
13 disorderly conduct statute. I would also say that the parading  
14 statute doesn't have an intent requirement. The parading  
15 statute in New York, Section 10-110, when you read it on its  
16 face is a strict liability statute. Since --

17 THE COURT: Wait. The police told them they could do  
18 this, they told them the ground rules. You can't just then say  
19 I don't really like the way -- I don't like the rules I made,  
20 so I'm now going to just stop it, you are all under arrest for  
21 illegal parade, can you?

22 MR. FARRELL: I would agree with you. If they had  
23 said, go ahead march. That's what happened in Vodak. You  
24 raised Vodak before?

25 THE COURT: Yes.

1 MR. FARRELL: There, that was typical parade route.  
2 Church and Fulton was not a parade route. Union Square and  
3 16th Street was not a parade route. There is no such thing as  
4 that in New York, Maybe 5th Avenue, perhaps, not there. In  
5 Vodak, it was a typical parade route. Police said to them  
6 nothing. They said go ahead. They didn't warn them, they  
7 didn't say they had to do anything. Didn't tell them they  
8 would be subject to arrest. The Court in Vodak said in that  
9 instance, that's like entrapment. That is very different than  
10 what happened at Church and Fulton Street. Because at Church  
11 Fulton Streets, they told the group ahead of time, you do not  
12 have a permit for this march.

13 Listen, I like to run. If I showed up with 150 or 300  
14 of my people I like to run with, and I want to have a race up  
15 5th Avenue and the cops say you have to follow the rules, and I  
16 say, okay, I'm going to do all of that, and I know I'm  
17 surrounded by 200 other people, I'm basically assuming the risk  
18 that if this unit that I'm involved in breaks the law as a  
19 group, we take over the roadway, yeah, I am subject to arrest,  
20 the cops just told me I was subject to arrest. I think that is  
21 vastly different than the facts that were set forth in Vodak.

22 THE COURT: So what are the violations, then? That  
23 you are referring to. So, more than two arrests? That's what  
24 you are saying the evidence reveals?

25 MR. FARRELL: There were more than two abreast. The

1 videos show they didn't cross with the traffic light. There is  
2 a -- the video shows they turned the banner to block the  
3 sidewalk, they didn't keep it vertically as they said they were  
4 going to. They turned it horizontally. And they block the  
5 entire sidewalk.

6 THE COURT: The entire sidewalk is blocked because  
7 Monahan loses his head, stops the thing, and then doesn't let  
8 anybody go forward, while the folks in the back keep moving  
9 forward. That's pretty obvious. I just think if you are going  
10 to insist that it was magnificent police work the whole way, I  
11 just think you are going to run up against facts that are  
12 difficult to square. I mean the rest of the cops looked  
13 utterly confused as to why Monahan is going nuts.

14 You disagree with that?

15 MR. FARRELL: What I --

16 THE COURT: They have gone half a block when he shut  
17 the whole thing down.

18 MR. FARRELL: And you know what the testimony of the  
19 marchers were, some of the admissions we got in deposition?  
20 Nine plaintiffs admitted at deposition that it would have been  
21 difficult for anyone to walk against the flow of the marchers  
22 that day.

23 Another plaintiff, Jeffrey --

24 THE COURT: But, again, if the cops told them they can  
25 do this, two abreast, you can't change the rules in mid march,

1 can you?

2 MR. FARRELL: No. But they were not two abreast.  
3 Your Honor, if that videotape showed people processing two  
4 abreast in an orderly fashion, I agree with you. But the video  
5 demonstrates they were four, five, six abreast, they were  
6 flowing up the entire sidewalk. That's what the video shows.  
7 And the plaintiffs' submissions admit that.

8 Jeffrey Cohen, a plaintiff, testified that he was,  
9 quote, swallowed up by the marchers. He was one of the three  
10 out the 220 that said he came into the march. He wasn't there  
11 to participate, he was trying to walk up the sidewalk. He was  
12 swallowed up by the marchers and tried to cross the south side  
13 over Fulton Street because he felt claustrophobic. Another,  
14 Katharine Krassan recalls being engulfed, making it difficult  
15 to walk on the sidewalk --

16 THE COURT: Before or after the order to stop the  
17 parade and everybody from behind then moved out.

18 MR. FARRELL: Before, your Honor.

19 THE COURT: The testimony reflects it was before?

20 MR. FARRELL: Before. They said they were swallowed  
21 up. And then when they were trying to work their way out, they  
22 couldn't get out, and then they were placed under arrest.

23 Those were admissions cited in our briefs and in our  
24 papers.

25 THE COURT: Well, obviously, the parade was stopped

1 before people were put under arrest, right? The front of the  
2 parade, the front of the march was stopped before anybody got  
3 arrested at that point. I mean Chief Monahan basically said  
4 stop, stop it right there. They put bicycles in front of the  
5 leaders, and then stopped everybody from moving. But what  
6 happened in the interim was that the folks in the back of the  
7 line kept moving forward. So certainly by that point they were  
8 more than two abreast.

9 MR. FARRELL: If they had all been single file, two  
10 abreast, and then they get stopped and that causes them to not  
11 be single file, two abreast, I would agree with you. But the  
12 video shows as soon as that group started across the street and  
13 on the sidewalk, they were taking over the whole sidewalk and  
14 we have plaintiffs' admissions in the video to show that.

15 I would like to move to 16th Street. I think that,  
16 there, it is also undisputed that that group was acting as a  
17 cohesive unit. There was no permit there. The plaintiffs  
18 admitted that they knew it was --

19 THE COURT: It was a cohesive unit at 16th Street.  
20 The issue is did the arrest, and the order to arrest, involve  
21 what a reasonable officer would have recognized to be those who  
22 were engaged in the collective action and a lot of other  
23 bystanders. And so there are people on the sidewalk, people  
24 just walking trying to get to where they are going, and some  
25 people just having a drink at a sidewalk cafe. That's clearly

1 on the video, right?

2 MR. FARRELL: Yes, but those people were not arrested.  
3 There is no plaintiff here in this room, or in any of the  
4 papers, out of all of the people that are suing at 16th Street  
5 that says I was arrested for sitting at a cafe. No one. Not a  
6 single person. So, yes, does the video show there were people  
7 on there? Yes. But the fact that they are not part of the  
8 plaintiff shows that the Police Department's efforts to make  
9 sure they only arrested the people that had engaged in the  
10 unlawful conduct were successful, at least reasonably  
11 successful. Again, the litmus test here is not that we have to  
12 show a criminal conviction beyond a reasonable doubt. We just  
13 have to show a probability of criminality by the people that  
14 were placed under arrest. We're not dealing with criminal  
15 conviction. And your point that, yes, the video shows  
16 people --

17 THE COURT: One of the things that is good about  
18 having these, is I get to eventually ask a question or two. So  
19 you just can't run right over me. You can't do that.

20 MR. FARRELL: I don't mean to do that, your Honor.  
21 I'm just cognizant of the time and the several points I'm  
22 trying to make.

23 THE COURT: All right. But my questions count against  
24 your time, that's just life.

25 So the point I'm trying to make is that there are all

1 these people on the street. The record seems pretty silent,  
2 actually, as to what efforts were done, as was done in Bernini,  
3 to cull through and segregate those who were part of the  
4 collective action and those weren't. I don't know why the  
5 record is so silent on that, but it's pretty silent.

6 Couple of cops were sent through, not clear how long  
7 they were given, not clear what exactly they were directed to  
8 do or what instructions they were giving. It is kind of --

9 MR. FARRELL: I don't -- well, I would disagree with  
10 your Honor. I don't think the record is silent. I think the  
11 record is clear.

12 THE COURT: Tell me what the record says.

13 MR. FARRELL: All right. Well, at 16th Street, police  
14 lines were formed at both ends of 16th Street. The parade  
15 comes out of the park, it processes north on Union Square East,  
16 turns up to 16th Street, it heads east. At the point, Essig  
17 runs down along the group, runs down 16th Street, gets a couple  
18 cops at the far end of that block that are in place, forms a  
19 police line, the group keeps marching until it reaches that  
20 police line, where it stops.

21 THE COURT: Right.

22 MR. FARRELL: At that point, a line that had prevented  
23 the group from going, continuing north up on Union Square East,  
24 there is about -- you know, cops, fold in behind the group, and  
25 seal off 16th Street at Union Square East.



1 THE COURT: Right.

2 MR. FARRELL: That is depicted on the videotape.

3 THE COURT: So what is the process designed, as in  
4 Bernini, to separate out the bystanders from the collective  
5 activists?

6 MR. FARRELL: Right.

7 Chief Essig dispatches two lieutenants, Johnson and  
8 Cortright to identify people who were not part of the group.

9 THE COURT: What were the criteria they were to use in  
10 identifying those people; anybody who was shaven didn't count?  
11 Or what? I don't understand. What were the criteria?

12 MR. FARRELL: Well, the criteria weren't identified in  
13 Bernini as to what they did.

14 THE COURT: No, they were not. That's a flaw of  
15 Bernini, that it doesn't give much guidance. It sort of states  
16 conclusorily, well, 200 people were let go, 160 were kept.  
17 Here, I don't think I have those numbers at all. Not clear how  
18 many were let go or how many were kept. And it's certainly not  
19 clear what criteria the officers were given to decide who was a  
20 dolphin and who was a tuna.

21 MR. FARRELL: The officers were there, they were  
22 trained police officers. They had witnessed the crowd --

23 THE COURT: Look, no one has greater respect for  
24 police officers than I do. And I know it is a tough job, and I  
25 know these were very difficult circumstances. But what exactly

1 were those two officers supposed to do to determine who was a  
2 parader and who was a bystander.

3 MR. FARRELL: They were going up and down the block  
4 telling people that if they were not part of the group, they  
5 should go back into their businesses, go back into their  
6 apartments, or they should leave the house.

7 THE COURT: Leave the house?

8 MR. FARRELL: The block.

9 Specifically, I believe it was -- I believe it was  
10 Captain Johnson. There was a videotape that was submitted as  
11 part of our submissions. It's Chapter 6 of defendant's  
12 videotape submissions at 16th Street. At minute 7:02 to the  
13 end, where a videographer on the street, approaching -- Captain  
14 Johnson is coming down there, right in front of the camera.  
15 And the person says how can I leave the block, how can I leave  
16 the block.

17 On the videotape, Captain Johnson says to him just go  
18 down to the end and exit at the end of the block. Which the  
19 videographer then leaves the camera on, proceeds down to the  
20 Union Square East end of block where you see on that videotape  
21 the line of police officers standing, facing out towards Union  
22 Square Park. They are across this way. The block is behind  
23 them. They are keeping people out. His videotape captures  
24 them saying, no, you can't come in here.

25 So the first thing that videotape demonstrates police

1 officers were making efforts to keep people from wandering into  
2 the block.

3           The second thing it shows, he continues to film -- and  
4 you can see people, dozens and dozens of people, leaving the  
5 block through the police line. They are walking right out  
6 through the police line, through the line of police officers.  
7 Nobody is stopping him. He videorecords this. He, then, is  
8 standing there. He, himself, steps through and goes right out  
9 through the sidewalk and leaves the block.

10           This is all captured on video. So you have a  
11 videotape which captures the instruction of a police officer  
12 saying you want to leave the block you go this way. So that  
13 demonstrates two things; one, that Captain Johnson and  
14 Cortright were, in fact, going down the block and trying to  
15 sort through who was there committing unlawful conduct and who  
16 wasn't; and two, it shows that even if you had been engaged in  
17 the unlawful conduct, that you were permitted to leave the  
18 block. Because Captain Johnson says on that videotape, which  
19 is -- Captain says, quote: If you want to break off from the  
20 group and go back, he says, you may do so on the sidewalk.

21           So that that's the steps that were taken to make it  
22 reasonable that Chief Essig and Inspector Dieckmann believed  
23 that the people they had left on that block after those efforts  
24 were taken, were the ones who had been engaged in unlawful  
25 conduct and were demonstrating an intent to continue to do so.

1 If you look at every video that's been submitted -- and there  
2 is dozens of videos -- you don't see anybody on those videos  
3 saying, oh, how do I get, out where do I go, oh, I'm stuck on  
4 here.

5 THE COURT: Well there are certainly some people who  
6 are saying that, right?

7 MR. FARRELL: Not on the videos, they're not. The  
8 only person on the video --

9 THE COURT: Wait.

10 MR. FARRELL: I'm sorry, I apologize.

11 THE COURT: We're not limited to what is on the  
12 videos, right? There have to be no disputes of material fact  
13 for me to grant your motion. So there are certainly people who  
14 are saying, I tried to get out and I couldn't get out, right?

15 MR. FARRELL: But under Scott v. Harris, when you have  
16 videotape that shows what happened, you have people that said  
17 they did that, but the videotape overwhelmingly shows that over  
18 the hundreds of people that those videotapes capture, nobody is  
19 asking where do I go, and what do I do. And what those  
20 videotapes shows are people dancing, singing, and covering the  
21 cameras, whether it's a Taru camera, a police department  
22 camera --

23 THE COURT: Clearly probable cause to arrest a lot of  
24 people. The issue is whether it was reasonable to conclude  
25 that everybody on the street at the time of the arrest was part

1 of this unlawful assemblage, this unlawful parade. And that's  
2 the issue. And so in Bernini and Carr, there are efforts, you  
3 know defined or not well defined, about trying to cull through  
4 who is a part of the group and who is not a part of the group.  
5 And it's less clear to me here what the criteria were. Some  
6 people clearly are able to leave at certain points in the  
7 video. It's not clear exactly -- it's hard to I think discern  
8 from the video too, at who what point arrest decisions are  
9 being made and how much time people were given to disperse.

10 MR. FARRELL: If you look at the videos, your Honor,  
11 that I just quoted and the ones that were submitted, you see  
12 there is ample time where the video captures people walking  
13 out, dozens and dozens of people walking through the police  
14 lines. And I think that the effort that was made there is it  
15 wasn't a case where the police just said everybody on 16th  
16 Street, we're arresting everybody. They did the same thing  
17 that the Court in the Eighth Circuit in Bernini found was  
18 reasonable. They made an effort to discern who was part of the  
19 unlawful group and who wasn't.

20 THE COURT: But what did they do to discern. That is  
21 not -- I keep coming back to this. So what was the criteria  
22 for allowing people to leave or not allowing people to leave?

23 MR. FARRELL: You have people who are easily  
24 identifiable as having part of the march. Two bands in uniform  
25 with instruments that had led the march. You had people who

1 were carrying a banner; some of them got out and perhaps some  
2 of them didn't. You had people that were in the street, in  
3 front of -- when the group came up to 16th Street at the Irving  
4 Place, the police line was formed, the group stops, people put  
5 bandannas on, they sit down. The people behind them continued  
6 to sing, dance, and chant. And they start chanting: Whose  
7 streets, our streets; whose streets, our streets.

8 The cops are there observing this. This is not a case  
9 where the cops chased them onto some other block. They see who  
10 it is. They are there. They then cordon that group off, after  
11 allowing the time for the people that wanted to leave.

12 THE COURT: How much time was allowed for them to  
13 leave?

14 MR. FARRELL: The testimony by Chief Essig I think is  
15 between 10 and 15 minutes before the block was sealed off.

16 And I'll say this, that the -- the --

17 THE COURT: That's undisputed? I mean, look --

18 MR. FARRELL: There is no --

19 THE COURT: -- there are certainly witnesses that said  
20 that they were not afforded, an they did not hear a dispersal  
21 order and didn't have sufficient time to get away, right? You  
22 may disagree with whether that is true, but there is certainly  
23 people saying that, right?

24 MR. FARRELL: I think it's undisputed when you look at  
25 the videotape. The videotape shows that the person came up and

1 said where can I get out and he says, yeah, go down to the end  
2 of block, walk down the sidewalk and exit, and this guy does it  
3 with his video camera and captures dozens of other people doing  
4 it. I think this demonstrate there was ample time to proceed  
5 from one side of the block to the other, and exit through the  
6 line of police officers. I think it is undisputed. You can  
7 have somebody says, oh, I didn't have enough time, but the  
8 videotape shows that you did have enough time.

9 And the last point I would add to this issue is, in  
10 Carr, plaintiffs in that case, in Carr, DC case, moved for a  
11 rehearing. And on rehearing, the Court said, raised another  
12 issue and said can you arrest people who did not violate the  
13 law. That was part of what Carr said. Specifically, in the  
14 first time the District Court said, quote -- Carr says: To be  
15 sure under the standard of our cases, the police are obliged to  
16 show that the crowd acted unlawfully as a unit. It is possible  
17 that an entirely innocent person would be mistaken for a  
18 rioter, but the standard is probable cause, not certitude.

19 So under the circumstances and the facts that are  
20 undisputed, I think it compels the conclusion that the police  
21 made reasonable efforts to believe that people they placed  
22 under arrest were the ones who were engaged in unlawful conduct  
23 on that block. And the fact that someone may be, and you don't  
24 have a lot of plaintiffs who claim that. In fact, most say  
25 they were there and had been walking along as part of the march

1 as part of the march or observing the march. So you had a  
2 crowd of people who all processing together, very small number  
3 of people who say, oh, I came from a different way.

4 Mr. Dunn's client, Dinler, no, he said that is the  
5 typical plaintiff at that location. That's not the typical  
6 plaintiff at that location. That's one of the very few  
7 plaintiffs who claim they came in from a different direction.  
8 I think only two plaintiffs in total, out of several hundred  
9 that claim they came in from the eastern side of the block  
10 versus the western side of the block. So that's the standard  
11 in Carr.

12 I'm gonna switch over to my other motion. But I just  
13 wanted to say that there is no requirement at law for dispersal  
14 order. Carr makes that clear in these situations, when you  
15 don't have -- when you have a group that is acting cohesively,  
16 you don't need a dispersal order. Papineau --

17 THE COURT: What you need to do is to be reasonable in  
18 your belief, as a police officer, that everybody you have  
19 arrested is part of the collective unlawful assemblage, right?

20 MR. FARRELL: That's correct. And the facts we have  
21 articulated, I believe demonstrate that the police officers at  
22 these two locations made reasonable efforts to do that. And  
23 that's the probable cause standard.

24 You know, if reasonable officers could disagree or a  
25 mistake was made, then these officers are entitled to qualified



1 immunity. These are very difficult circumstances which the  
2 police officers are facing when they are trying to police a  
3 large crowd. The DC Circuit recognizes that. You have these  
4 officers trying to do the right thing. They give warnings.  
5 They try to make decisions about who is in the crowd and who is  
6 not. And it's all captured on videotape. At both locations  
7 there are two high-ranking officers who consult and say, you  
8 know what, you know, the facts presented to us show that we  
9 believe that there was criminality here. If there is --

10 THE COURT: Are you suggesting that Monahan consulted  
11 with people before he stopped that march?

12 MR. FARRELL: I'm saying that it was a joint decision  
13 between Chief Galati and Chief Monahan to make the arrest.  
14 They either both came to it independently, or they both agreed  
15 upon it. And from the Police Department's -- the law says when  
16 it is collective knowledge, the knowledge of one can be assumed  
17 by the other when you are going to be making arrests in that  
18 way. And in fact Mr. Spiegel added Chief Galati as a defendant  
19 in these cases based upon the fact that he was involved in the  
20 decision to make the arrests and in fact Magistrate Judge  
21 Francis granted that.

22 So you have two senior officers deciding that probable  
23 cause exists. And what I'm suggesting is the law of qualified  
24 immunity -- could it be a mistake here? Yeah, this could be a  
25 mistake. But that's what qualified immunity is intended to

1 protect. Qualified immunity is intended to protect, quote, in  
2 the Supreme Court case, Ashcroft, all but the plainly  
3 incompetent. And I'm going to end on this section by saying at  
4 those two locations, the steps that the officers made do not  
5 make them plainly incompetent. They try, they tried to do the  
6 right thing. You may say, hey, maybe this could be a  
7 disagreement about it, but then that's the case that dictates  
8 for the granting of qualified immunity to these officers.

9 So I'm going --

10 THE COURT: Judicial immunity even covers the  
11 incompetence, which is something that I take solace in every  
12 day.

13 MR. FARRELL: So unless your Honor has other  
14 questions, I could go on on this, but I need to utilize my time  
15 and go on to the other motion.

16 THE COURT: Yeah, you have 20 minutes.

17 MR. FARRELL: So the City has made a motion for  
18 summary judgment on it's two policies. One was to have people  
19 who are engaging in RNC related unlawful conduct put through  
20 for a custodial arrest or receive a DAT if eligible. And in  
21 these cases, that has been shortened to be called a no summons  
22 policy, so I'll refer to it as the no summons policy. The  
23 second part of that was that those people arrested, pursuant to  
24 that policy, would be fingerprinted.

25 Plaintiffs in these RNC cases have basically agreed

1 and dismissed a lot of their claims either explicitly or they  
2 have abandoned them. That's set out in our reply brief. We  
3 delineate all of those. What's left are three things.  
4 Plaintiffs make a First Amendment challenge to the policy,  
5 excluding a retaliation claim, they are not making a  
6 retaliation claim against the defendant City only. Part of  
7 what they've said is they are not making any claims against the  
8 individuals. So the City should get summary judgment on those  
9 claims, the claims against the individuals should all be  
10 dismissed. The only claims that are left are against the City,  
11 and there are only three. One is a First Amendment challenge,  
12 as I have said, the policies, but not retaliation claim. The  
13 second is a claim limited to the MacNamara plaintiffs that the  
14 policy violated the Fourth Amendment.

15 The Schiller and Dinler plaintiffs, explicitly say  
16 they are not making such a claim for violation of the Fourth  
17 Amendment or for those policies, summons and fingerprint  
18 policies under the Fourth Amendment. And I would suggest to  
19 the Court that if the plaintiffs' counsel for Schiller and  
20 Dinler are not making a claim under the Fourth Amendment for  
21 those two things, that the next best thing has no reasonable  
22 hope of being successful, otherwise they would have promoted  
23 such a claim.

24 THE COURT: Well, wait. You're going to say that  
25 because they abandoned the claim, and I have to assume that

1       there is no merit to it?

2               MR. FARRELL: I think that's reasonable.

3               THE COURT: I'm just farm out all my stuff to  
4       Mr. Dunn. Let me know how it goes.

5               MR. FARRELL: Having litigated against Mr. Dunn, I  
6       know he would not forego a claim if he thought there was a  
7       chance of success at it.

8               THE COURT: So I should assume that the ones he is  
9       keeping are pretty good?

10              MR. FARRELL: No -- those are only ones that have a  
11       slight chance of --

12              THE COURT: All of this laughter is coming out of your  
13       time?

14              MR. FARRELL: The third is a state law claim regarding  
15       alleged violation of New York Criminal Procedural Law 160.10.  
16       And, again, that's against the City only.

17              THE COURT: Let's start with that one. Actually,  
18       that's a matter of statutory construction, right? The language  
19       in the fingerprinting statute, that's what we're talking about,  
20       right?

21              MR. FARRELL: Yes.

22              THE COURT: Pretty explicit, it seems to me. It says  
23       that, basically, an officer for offenses like the ones at issue  
24       here can only fingerprint if there are two exceptions, right?

25              MR. FARRELL: Yes, your Honor.

1 THE COURT: Let me find it.

2 MR. FARRELL: Right, it says that you may fingerprint  
3 when those things exist.

4 THE COURT: Well, it says: In addition, the police  
5 officer who makes an arrest for any offense, either with or  
6 without a warrant, may take or cause to be taken the  
7 fingerprints of the arrested person if such officer, (a), is  
8 unable to ascertain such person's identity or, (b), reasonably  
9 suspects that the identification given by such person is not  
10 accurate or, (c) -- which doesn't really apply here --  
11 reasonably suspects that such person is being sought by law  
12 enforcement officials for the commission of some other offense.  
13 So we're really just talking about 2(a) and 2(b), right? And  
14 those are the conditions that are -- I mean it's either (a) or  
15 (b) that are necessary to enable a police officer to take the  
16 fingerprints of a person charged with an offense such as this,  
17 correct?

18 MR. FARRELL: Well, on the face of the statute, it  
19 doesn't prohibit fingerprinting in other instances, but it does  
20 say, it does say what you have read.

21 THE COURT: So you're suggesting that what it really  
22 says is that a police officer may take fingerprints in his or  
23 her complete discretion, and by the way we'll list a couple of  
24 things that might justify the taking of fingerprints, but by no  
25 means is this an exhaustive list? That's the way judges write,

1 but not the way legislators do.

2 MR. FARRELL: I'm not sure that the statute is always  
3 that clear, what I'm pointing out is that it doesn't say that  
4 you can't take it.

5 THE COURT: All right. Well, it says that the  
6 condition of the officer -- well, it says the officer may take  
7 the fingerprints if (a) or (b). You're suggesting that it  
8 means that he may also do it under other circumstances not  
9 mentioned here.

10 And do you have any authority for that?

11 MR. FARRELL: No, just a plain reading of the statute,  
12 your Honor.

13 THE COURT: All right. So let's talk about (a) and  
14 (b) then. So: If unable to ascertain such person's identity.

15 I mean, so, what is the evidence for being unable to  
16 ascertain such person's identity. Seems to me both (a) and (b)  
17 are really turning on intelligence that was received before the  
18 convention that some portion, or some persons who might be  
19 there to upset the proceedings or to cause civil unrest in the  
20 City, were going to not be bringing identification, or bringing  
21 false identification; correct?

22 MR. FARRELL: Yes, your Honor.

23 THE COURT: And so you're saying that that  
24 intelligence would justify a policy to fingerprint everybody  
25 who got arrested during that time frame of the convention?

1 MR. FARRELL: Well, this only pertains to violations;  
2 people arrested for felonies and misdemeanors have to be --

3 THE COURT: No, I get that. Just those for  
4 violations.

5 MR. FARRELL: Right.

6 And in response to that, the City had intelligence,  
7 which is set out in our papers, which says that people were  
8 coming here to engage in unlawful activity, would also be  
9 bringing false identification. And on top of that, as a  
10 mechanism, how are you going to allocate police resources and  
11 how are you going to handle the possibility of large-scale  
12 arrests, it made a decision that everyone was gonna be  
13 fingerprinted. It did that because it believed that there was  
14 a high likelihood of people would have false identity.

15 THE COURT: But wait a minute. The time it takes to  
16 fingerprint somebody is probably longer or equally time  
17 consuming as having the officer look at the ID and say that  
18 looks like you, this seems like it's legit. I mean so I don't  
19 understand why you can't just -- why this is a decision that is  
20 left up to the individual officer who is taking the photo I.D.  
21 as opposed to saying nobody is going to be able to show us  
22 their photo I.D. because we're fingerprinting everybody.

23 MR. FARRELL: Well, due to the security interests in  
24 the RNC, we submitted a declaration from Brian Jenkins, who  
25 supports the conclusion that, in today's society, fraudulent

1 IDs can look as real, as real as real IDs. And presenting an  
2 ID that looks otherwise --

3 THE COURT: But that's true whether you are at the  
4 Republican National Convention or anyplace else, right?

5 MR. FARRELL: But the difference, there, is that  
6 during the Republican National Convention, there were  
7 heightened security concerns for all of the reasons that are  
8 set forth in our papers. There was concern that you were going  
9 to have people coming here to engage in violent acts, there was  
10 the possibility of terrorism during the RNC. There was also  
11 the City wanted to get the best possible prosecution against  
12 the people that were involved in the unlawful activity. And to  
13 make sure that you have the right person. The way -- the best  
14 way to try to ensure that you have the person it says who they  
15 are is to fingerprint. And that's set out in --

16 THE COURT: That's always gonna be true. But the  
17 issue is that the statute limits it to two circumstances, it  
18 seems to me.

19 And so the first is whether the police officer is  
20 unable to ascertain such person's identity, or reasonably  
21 suspects that the identification given is not accurate. And so  
22 it seems like there to was no attempts to do either of these on  
23 an individual basis, correct?

24 MR. FARRELL: We concede that it was not done on an  
25 individual basis, your Honor. Because, as we have set forth,



1 the totality of the circumstances and the security interests  
2 that were at stake and the reality of fraudulent  
3 identification, and on top of that the fact that the Police  
4 Department knew that a lot of people were going to be coming in  
5 from out of state, where officers were not going to have  
6 familiarity with those types of identifications, drivers  
7 licenses, whatever else people may show, there was a whole host  
8 of reasons that warranted, under these circumstances, to  
9 trigger those two exceptions that there was a reasonable belief  
10 that you were not being shown proper identification, which is  
11 different than your every day non-RNC situation.

12 THE COURT: Well, but I mean -- I think everyday  
13 situations, people might have incentives to use false  
14 identification. Anybody who finds themselves on the wrong end  
15 of a summons or the wrong end of a police officer is going to  
16 have some incentive not to necessarily give the correct  
17 identification. And if false identifications are that  
18 ubiquitous and easy, seems to me the best thing to do would be  
19 to change the statute, but --

20 MR. FARRELL: Well, your Honor, the ability to get  
21 false IDs is very different from when the statute was first  
22 written however many years ago. And, again, the dates are in  
23 our papers. Technology has changed --

24 THE COURT: That's true. But is that a basis then for  
25 police officers to, or for a police department to just say,

1 well, we are not doing that anymore because technology has  
2 changed?

3 MR. FARRELL: For that event, I believe it is.

4 THE COURT: Why not just generally, why can't the NYPD  
5 say, then, you know what this, statute was written in -- I  
6 don't know when it is -- oh, my goodness, 1971. So -- with  
7 some amendments in 2010. But let's just assume now the Police  
8 Department says, oh, this is completely out of date, we're not  
9 going to do this, so we're going to adopt new policy that  
10 countermands this statute. They can do that?

11 MR. FARRELL: We are not saying it's a new policy.

12 THE COURT: But I'm asking to you indulge me and say  
13 if a police department said that, that would be okay according  
14 to the statute?

15 MR. FARRELL: No, I would not say they are rewriting  
16 the statute. I'm saying the reality of that statute, when you  
17 reasonably suspect someone doesn't have the proper ID or has a  
18 fake ID, in 2012 people can generate ID off a computer that  
19 they couldn't do in 1971. Now, I'm saying they would fit  
20 within the exception of that statute.

21 THE COURT: Well, but it has to be a reasonable  
22 belief.

23 MR. FARRELL: Right. And the reasonable -- sorry.

24 THE COURT: So I mean that's the inquiry, is whether  
25 there is a reasonable belief. And it seems to me what you're

1 saying is that, in 2012, and maybe even 2004, that it would be  
2 reasonable to believe that everyone has got fake ID and,  
3 therefore, the statute no longer applies.

4 MR. FARRELL: I'm saying the -- I'm not saying the  
5 statute doesn't apply, I'm saying it's two parts of it. One is  
6 we have to recognize the reality of how easily accessible  
7 fraudulent identification is in today's -- in 2004 and today.  
8 And, two, there were special circumstances revolving around the  
9 RNC that warranted to make a policy decision, rather than  
10 leaving to ad hoc determinations under those circumstances of  
11 the RNC when you are faced with possibility of mass arrests and  
12 large quantities of people to fit within the parameters of that  
13 statute.

14 THE COURT: But then it turns on whether that policy  
15 is reasonable, I guess, right? You're just saying it has to be  
16 reasonable. Reasonableness is the test. But policy, in the  
17 event of a large event like the RNC is more appropriate than  
18 just leaving it up to the individual police officers.

19 MR. FARRELL: That's what we're saying, your Honor.

20 THE COURT: Well, let's get to other policy,  
21 because --

22 MR. FARRELL: The other thing I would say, your Honor,  
23 is, on the fingerprinting statute, that there also is no  
24 private right of action stated for a violation of that statute.

25 THE COURT: Now, there is some precedent that has

1 allowed a private right of action and damages. It goes back to  
2 1950 or something, right?

3 MR. FARRELL: I believe so. I think it may -- I don't  
4 really want to use my time discussing those cases. And if you  
5 do, we can have a discussion, I brought one of my colleagues  
6 for that.

7 THE COURT: No, let's just get to the --

8 MR. FARRELL: Right. There is no explicit private  
9 right of action. And I would say that the other sections of  
10 the criminal procedure law provides for the destruction of  
11 those fingerprints. And that was the remedy that the  
12 legislature intended to provide in that event. Not just on  
13 awarding a lot of individual damages claims, but that statute  
14 was initially written so you could create fingerprinting data  
15 bases for the benefit of the police department. It wasn't for  
16 the benefit of individuals.

17 THE COURT: Wasn't designed to be punishment, right?

18 MR. FARRELL: No. And we are only talking about --  
19 this is only the criminal procedural law. The section, under  
20 the Constitution --

21 THE COURT: I got it. Move to the next point.

22 MR. FARRELL: All right, so --

23 THE COURT: No summons policy.

24 MR. FARRELL: Yeah, no summons policy.

25 So the first question is whether the no summons policy

1 imposed a direct and substantial burden on First Amendment  
2 activity. And this was a policy that was not directed at  
3 speech, there is no way around that. The policy was to only  
4 apply if you were perceived to have broken the law. And this  
5 goes back to my eight hundred thousand people that  
6 demonstrated. They all demonstrated without being subject to  
7 the no summons policy. Because they were not perceived to be  
8 breaking the law, they were not arrested. So the policy is  
9 clearly just by the size and scope of the demonstrations that  
10 took place where the policy didn't apply, shows that the policy  
11 was not directed at First Amendment speech, it was directed  
12 at --

13 THE COURT: Let me interrupt. I mean if somebody is  
14 jaywalking on a street in a different part of Manhattan, they  
15 are not subject to the no summons policy, right, even during  
16 the time period of the convention, correct?

17 MR. FARRELL: If --

18 THE COURT: If you were jaywalking on 10th Avenue and,  
19 you know, 12 Street where there is nothing going on, presumably  
20 you were not subject to the no summons policy, right?

21 MR. FARRELL: I don't believe jaywalking was one of  
22 the concerns that was a threat that were identified.

23 If you were involved in unlawful activity that the  
24 intelligence had said was a concern to the City, because it was  
25 intended to disrupt, shut down the RNC, shut down the City,

1 block the ability of the City to operate, have emergency  
2 vehicles operate, to have delegates be able to get to the  
3 convention, to and from hotels and other events, that was the  
4 type of conduct that the policies were directed to address.  
5 And it is only to unlawful conduct. The only time the policies  
6 were triggered is if you were arrested for unlawful conduct.

7 THE COURT: But unlawful conduct, I just want to be  
8 clear about this. There is unlawful conduct and there is  
9 unlawful conduct. What you just said is this is unlawful  
10 conduct that was believed designed to disrupt the Republican  
11 National Convention.

12 MR. FARRELL: Or the City. It was -- yeah, it was the  
13 types of threats and conduct that the intelligence information  
14 that had been developed said was going to try and shut down the  
15 City, generally, or shutdown the RNC.

16 THE COURT: But are you suggesting that somebody who  
17 engaged in that conduct, far removed from the RNC, was going to  
18 be subject to the no summons policy.

19 MR. FARRELL: If they were engaged in unlawful conduct  
20 that the police officer believed was of the type that had been  
21 identified --

22 THE COURT: Well, maybe -- so what is the type that  
23 has been identified?

24 MR. FARRELL: Well, it was -- well, it was generally,  
25 as I had said, conduct intended to disrupt the City, disrupt

1 the RNC. And that conduct could take place in outer boroughs.  
2 Some of these events, some of the possibilities were that this  
3 was going to be coordinated conduct. There were discussions of  
4 plans of people who wanted to do this, they were going to  
5 create diversions out in outer boroughs to draw police  
6 resources out there so they could do things here in Manhattan.

7 There is a whole host of reasons why it is not the  
8 proximity or the location of the conduct, but it's the type of  
9 conduct, illegal conduct, that the department anticipated.  
10 That's what the policy would apply to.

11 THE COURT: But you're telling me, so you like to run.  
12 And so you, in Queens, decided with your buddies to do a little  
13 road race. You're saying you and your friends, during the  
14 period of the Republican National Convention would have been  
15 subject to the no summons policy, even though you had no  
16 interest in disrupting the RNC and no interest in making any  
17 kind of political statement, you are saying that you and your  
18 buddies would have been subject to the same no summons policy.

19 MR. FARRELL: No, I think the testimony is clear.  
20 Chief Esposito has testified that the policy didn't apply to  
21 things that would have been going on anyway, absent the RNC.  
22 The concern was the RNC and the undeniable intelligence that  
23 there was a mass movement to try and disrupt the City and the  
24 RNC during that time. So if there was a demonstration that was  
25 going on, had nothing to do with the RNC and had to do with

1 some, you know, business dispute, the policy didn't apply  
2 there. I mean we have laid that out in the declarations. It  
3 is in Chief Esposito's testimony. So it's the unlawful conduct  
4 that is at issue, and --

5 THE COURT: So somebody who was protesting the  
6 nonunion workers at a building and is engaging in the same  
7 activity, they're not subject to the no summons policy, but  
8 somebody who is against the War in Iraq would be subject to the  
9 no summons policy.

10 MR. FARRELL: No.

11 THE COURT: No.

12 MR. FARRELL: The policy was not content based.

13 THE COURT: Well, you could say that all you want, but  
14 you just said it was people directed towards disrupting the  
15 RNC. So somebody outside of a building protesting, and with a  
16 group of people, protesting the nonunion workers who had been  
17 brought into that building, that big rat, you know how it's  
18 done, they are doing that. So you are suggesting to me that  
19 those folks would not be subject to the no summons policy, but  
20 somebody who just, frankly, doesn't care about union workers or  
21 nonunion workers, but is really against the War in Iraq and  
22 wants to send that message to the Republican National  
23 Convention, they would be subject to the no summons policy.

24 MR. FARRELL: It's not the War in Iraq that triggers  
25 the policy.



1 THE COURT: Well, what is it, it's that they wanted to  
2 disrupt the RNC.

3 MR. FARRELL: And shut down the City. Yeah, it's  
4 unlawful conduct.

5 THE COURT: Well, they don't want to shut down the  
6 whole City, they just want to shut down maybe a couple blocks  
7 in front of the RNC, just like the folks in front of the  
8 nonunion building want to shut down that block.

9 MR. FARRELL: No, I disagree, your Honor.

10 I mean the intelligence clearly shows that they want  
11 to disrupt the City in its entirety. The delegates were  
12 staying at various hotels throughout the City. They all were  
13 not in a two-block radius at Madison Square Garden. There were  
14 events at those hotels, people going to the theater district,  
15 there were dinners --

16 THE COURT: I get all that. The whole issue here is  
17 almost a silly exercise, but that's what the law requires  
18 because of the different levels of scrutiny, right? So if it's  
19 content neutral, it's one level. And if it is content  
20 specific, it's a different level.

21 You're arguing that its content neutral. And I'm  
22 pressing you on that to say that its designed that any activity  
23 that is going to disrupt the Republican National Convention  
24 gets sort of close to content specific, doesn't it?

25 MR. FARRELL: No. The message doesn't matter. It is

1 not message based. The content of the speech is irrelevant.  
2 It's the act of the unlawful conduct that triggers the policy.  
3 The speech doesn't matter --

4 THE COURT: So if the intent is to mess with the  
5 Republicans, it is one thing, but if the intent is to mess with  
6 people of other political persuasions, it's less of a big deal?

7 MR. FARRELL: No one was making judgments about when  
8 the policy applies to what. The message was who they were  
9 intended to mess with. The message was whether they believed  
10 those people were here to disrupt the city and shut down the  
11 City during the time period of the RNC.

12 THE COURT: Clearly not specific to whether one is for  
13 the war or against the war, whether one is pro life or pro  
14 abortion or pro choice, right, it is not that. Because we had  
15 protestors, in fact, who got arrested for being -- criticizing  
16 the Republicans for not being pro life enough or conservative  
17 enough, right?

18 MR. FARRELL: Yes, your Honor.

19 THE COURT: All right. So you're urging, then,  
20 intermediate scrutiny.

21 MR. FARRELL: I'm urging two things. Before I even  
22 get to immediate scrutiny, I'm saying that because saying that  
23 conduct and not speech, that they can't even meet the threshold  
24 burden that they have to show that the policy places a direct  
25 and substantial burden on First Amendment activity.

1           Assuming arguendo that it does play, that they do meet  
2     the threshold burden and show there is direct and substantial  
3     burden on First Amendment activity then, yes, intermediate  
4     scrutiny should apply, because it's not a content-based policy.  
5     It's based upon conduct.

6           THE COURT:   Okay.

7           MR. FARRELL:   So the intermediate scrutiny test has  
8     two parts to it; must advance important governmental interests  
9     and must not burden more speech -- substantially more speech  
10    than necessary.

11          I think that, you know, the part about what the  
12    interest that -- the important governmental interests that were  
13    advanced, I'm not going to repeat. Those are all set out in  
14    our papers. Just in summary, the interests that advanced were  
15    that policies combatted threats to public safety, they ensured  
16    the flow of pedestrian traffic, they were sought to control  
17    spiraling criminal conduct, they ensure that the RNC was not  
18    shut down --

19          THE COURT:   Is it legitimate to say we just want to  
20    make sure that these folks only get to protest once a day,  
21    because if we just give them a summons, they will just collect  
22    tickets and not be moved or deterred, is that a legitimate  
23    interest?

24          MR. FARRELL:   I think there is two things there.

25          One is if you didn't break the law, you could have

1 protested to your hearts desire. And 800,000 people did do  
2 that. If you broke the law, then there was a legitimate  
3 interest in making sure that that conduct didn't continue,  
4 because the intelligence information showed that people were  
5 coming here with the intent to do that. And if you issue  
6 someone a summons on the street, and they are intending to  
7 block traffic or shut things down, that summons is not going to  
8 deter them. We submitted a declaration from Carl Holmberg who  
9 has many years of experience up in Washington. And he confirms  
10 all of those, all of those things. And when you -- and you  
11 also have the threat of spiraling disorder. You know what had  
12 happened before the RNC, and this is all set out in Chief --  
13 Commissioner Cohen's declaration, there were other cities that  
14 had hosted similar large-scale events. These are undisputed  
15 facts; Seattle in 1999, hosted the World Trade Organization --

16 THE COURT: I know that.

17 MR. FARRELL: Miami, 2003.

18 THE COURT: I know that. Don't tell you me what I  
19 know, you are on the clock, in fact, you are over time.

20 MR. FARRELL: I will try and speed up to the  
21 conclusion.

22 I think that the important things that are undisputed  
23 that the Court should recognize as undisputed and that the  
24 plaintiffs don't dispute, is that Commissioner Cohen provided  
25 information about a tripartite threat to the Executive

1 Committee, which included the police commissioner and Chief  
2 Esposito. That three-prong threat involved terrorism, anarchy,  
3 and widespread civil disobedience. The Schiller brief and  
4 Macnamara brief both concede that plaintiffs recognize the NYPD  
5 had information indicating that New York City faced threats of  
6 substantial disorder or worse during the convention. And  
7 further, that it used this information in planning for the  
8 convention. That the Schiller brief three in opposition, and  
9 in Macnamara they make a similar admission in their brief on  
10 page 1.

11 The threats were informed by information that was  
12 collected specifically for the RNC, which is set out in the  
13 End-User Reports. It also was informed by those prior  
14 large-scale disorder events. And, indeed, the Second Circuit  
15 has recognized in these RNC cases and their law enforcement  
16 privilege decision, they recognized that Commissioner  
17 Cohen's --

18 THE COURT: I remember that. I remember that one,  
19 yes, yes, yes.

20 MR. FARRELL: They credited Commissioner Cohen's  
21 research and analysis of security threats at other large  
22 events, including Seattle and Miami. And they said, they  
23 recognized that the NYPD needed a strategy to avoid disorder  
24 and violence during the RNC. The Circuit recognized that based  
25 on the End-User Reports that were before them.

1           The policies were in effect for a total of seven days,  
2           that they were in effect for seven days and they ended. This  
3           is not a statute that was adopted to last in perpetuity or for  
4           other days of the year, it was only during the time period in  
5           and around RNC. That is all the undisputed factual evidence.

6           I talked about what the needs were. Then the law  
7           requires that they fit, the policy be a reasonable fit between  
8           the policy and the government interest, and not burden more  
9           speech than is reasonably necessary. The one example we  
10          already talked about which is the continuous unlawful activity,  
11          is the perfect example of the reasonable fit. How to get the  
12          people, clear the condition, open the street up. You know,  
13          just think about 16th Street where you had all of those people.  
14          If you start issuing summons to those people, it was clear that  
15          they intended to keep breaking the law. The testimony in that  
16          case was police vehicles couldn't even get close to that  
17          location, because the traffic had backed all of the way up.  
18          They had to get out of their cars and run down. The same thing  
19          is true for ambulance, fire trucks, if you had emergency  
20          response vehicles, you couldn't do any of those things.

21           THE COURT: Mr. Farrell, I think I have got you 10  
22          minutes over what I gave you, so do you want to rap it up?

23           MR. FARRELL: I'll rap it up. And I'll save for  
24          rebuttal plaintiff's arguments as to why they attack the  
25          policies, also set out in our brief.

1 I also say the Macnamara plaintiffs, their argument  
2 that there is no Constitutional right to a summons, all you  
3 need to do is look at Virginia v. Moore and Atwater, and it's  
4 clear there is no Constitutional right to a summons that  
5 disposes of their case. To the extent they are still trying to  
6 allege equal protection claim, they have not met the  
7 comparative group. They have not also shown any animus in the  
8 record by the Police Department for adopting the policies.

9 And with that, I'll save the time you permit me or my  
10 colleagues for rebuttal.

11 THE COURT: That will be purely at my discretion.

12 MR. FARRELL: Okay.

13 THE COURT: Who are we going to hear from here, Mr.  
14 Dunn?

15 MR. DUNN: You can call me Judge Dunn, if you want, so  
16 let's --

17 THE COURT: Doesn't pay much, but I guess --

18 MR. DUNN: Let's start with the no summons policy.  
19 Your Honor, clearly, this was a content-specific  
20 policy. It was not viewpoint specific, it was content  
21 specific.

22 If you were involved in expressive activity connected  
23 to the convention, you got checked into Pier 57. If you did  
24 not, you did not. So take your jaywalking example, I will  
25 answer the question. If you had been jaywalking at 10th and

1 12th without anything connected to the RNC, yes, you would have  
2 gotten a summons and been on your way. If you -- did that with  
3 an RNC related sign in the Bronx, or in the farthest corner of  
4 Queens, you were going to Pier 57. Everybody who went to Pier  
5 57 was a protestor or connected to the protest.

6 Meanwhile, many people who engaged in the exact same  
7 conduct during the convention got summonses, including people  
8 right in Madison Square Garden who were charged with disorderly  
9 conduct and this Quality of Life initiative the department ran,  
10 directly across the street from the Garden, they got summonses.  
11 This was a protest policy. And, certainly, on summary  
12 judgment, we get that.

13 Second issue is the justifications for the policy.  
14 And again, this is --

15 THE COURT: Well, I mean so you're saying it is  
16 content specific, but what Mr. Farrell is saying is that this  
17 is not imposition on First Amendment rights, right?

18 MR. DUNN: He did say that. And I don't think Mr.  
19 Farrell would say that tomorrow the department adopted no  
20 summons policies for African-Americans, that was not a race  
21 based policy. Of course this was a speech policy.

22 THE COURT: That would be equal protection argument?  
23 Right.

24 MR. DUNN: Well, equal protection argument, but there  
25 would be no question that would be a race policy. Just like



1 this policy was an RNC protest policy. To be sure, you had to  
2 he be charged with an offense. But, then, they separated two  
3 groups of people; the people that charged with that offense  
4 while engaging in a protest activity got to go to Pier 57.  
5 Everyone else got to go home. And I would submit that is as  
6 much as speech based policy as anything. And given that it's a  
7 speech based policy, it's subject to strict scrutiny. Even if  
8 it is subject to intermediate scrutiny, and we think it is  
9 subject to strict scrutiny, there is then the question about  
10 what's the reason for the policy, and is it actually narrowly  
11 tailored. Here, we have big factual dispute. Mr. Farrell  
12 wants to treat the policy as being based on certain things.  
13 But of course there is a big dispute about that. You know,  
14 this is a policy that, according to the City, was adopted by  
15 Commissioner Kelly. Commissioner Kelly is completely absent  
16 from this case. There is no testimony from him. There are no  
17 documents about the reasons for the policy. What the City is  
18 left with is the memory of Chief Esposito, the Chief of the  
19 Department. And Joe Esposito is a good guy, but he has a  
20 terrible memory. And when you look at the deposition  
21 transcript -- and we put this in. He doesn't remember the  
22 particulars of about the policy. Indeed, he testifies he has  
23 got the wrong date by many months about when the policy was put  
24 into place. He testifies in his deposition, when specifically  
25 asked, that he has no recollection of the meeting where policy

1 was adopted in the conversation during that meeting. And he  
2 testifies that this was a policy that had been put in place for  
3 many prior events. The fact of the matter is, on summary  
4 judgment, when we get all of the facts construed in our favor,  
5 what you are left with is a policy that was seemingly adopted  
6 without any deliberation very early in the game, that was just  
7 a repeat of a policy from before. It had nothing to do with  
8 intelligence, it involved no deliberation that we can tell.  
9 And given that there is no basis for suggesting that that  
10 policy meets any sort of narrowing test, and any sort of  
11 compelling or intermediate scrutiny.

12 THE COURT: Well am I supposed to check common sense  
13 at the door. You read what Second Circuit said on these  
14 things, they seem to be very concerned about law and order,  
15 maybe more than I am. What is the response to that. I don't  
16 need Joe Esposito to remember the specifics of a meeting to  
17 know what are the obvious reasons to have a policy like this,  
18 right? Aren't they going to say that?

19 MR. DUNN: Not on summary judgment, they are not, your  
20 Honor.

21 THE COURT: Depends on the panel.

22 MR. DUNN: Fair point. And no one is more of a law  
23 enforcement person than you are.

24 THE COURT: I don't know about that.

25 MR. DUNN: Well, let's talk about the intelligence.

1 You want the talk about the intelligence, I mean, the City  
2 makes a big point of saying the intelligence played a big role  
3 in the policy. But when you look at the facts, at least  
4 certainly on summary judgment, and even otherwise, everything  
5 suggests otherwise. As you may recall, we got to within three  
6 days of the completion of pretrial discovery in the case,  
7 before the City ever mentioned Commissioner Cohen. And before  
8 the City ever mentioned this intelligence gathering operation.  
9 And we're year and a half, two years into the case. And, all  
10 of a sudden, Commissioner Cohen, for the first time, shows up.  
11 So we have the whole process with the Circuit, as you know, and  
12 how long that took, and then we depose Commissioner Cohen, and  
13 he says in his deposition I never participated in conversations  
14 about the policy, I didn't even know about the policy until  
15 after the convention was over, even though he was sitting in  
16 all of these meetings with Commissioner Kelly and Joe Esposito.

17 So when I look at those facts, it may suggest that  
18 there was common sense that this intelligence was being used  
19 for some reason. And I'm not suggesting for a moment that the  
20 City wasn't concerned about the information in the  
21 intelligence, wasn't maybe using it in some police setting.  
22 But that's a very different question in whether or not it  
23 played a specific role in the policy. And there is no evidence  
24 certainly on summary judgment, a tryer of fact, including a  
25 jury, could reasonably conclude that the intelligence played no

1 role in the policy, and they were simply adopting the policy as  
2 it had for many prior events.

3 So then you are left, even if in you want to suggest  
4 the intelligence played some role, and I'm not going to get  
5 into the details of this. But then the question would become  
6 what in the intelligence allows the City to single out protests  
7 as the sole source of threat for disorder during the  
8 convention.

9 And Mr. Farrell might want to say those people walking  
10 along the sidewalk on Fulton Street were the biggest threat  
11 that the City faced, or he may want to say that Georgianna, a  
12 former client of ours, one person standing in front of a Honda  
13 Dealership with a sign, who ended up going to Pier 57, was some  
14 huge threat to the RNC. But I would submit to you, your  
15 Honor -- we detail this in our briefs -- that when you look at  
16 the intelligence, nobody could conclude, as a matter of law,  
17 that this policy was narrowly tailored to the concerns that is  
18 in the intelligence, such that the City could single out  
19 protestors with a no summons policy, which is what it did.

20 Very quickly on the fingerprinting, I think you  
21 understand the fingerprinting. The statute says what it says.  
22 There is undisputed evidence from many plaintiffs, including  
23 all of ours, they had ID, they showed them ID, it was valid ID,  
24 the City does not get to ignore a state statute. They want to  
25 change it, they can change it.

1           THE COURT: Well, I guess the argument is that the  
2 statute doesn't require an individualized police officer  
3 determination, that the policy can be used, instead, where  
4 there is a reasonable bases to support the policy, right? But  
5 you're saying that that is unsupportable as a matter of  
6 statutory construction?

7           MR. DUNN: Yes. You asked Mr. Farrell is there any  
8 case law to support that and he said no.

9           THE COURT: Any case law that goes the other way?

10          MR. DUNN: I don't think --

11          THE COURT: Not a lot of case law on this one, right?

12          MR. DUNN: I don't think it's my burden to show case  
13 law that establishes what the statute says on its face. The  
14 statute, on its face, says they have to have a reason to  
15 suspect the bona fides of the ID of the person in front of  
16 them.

17          THE COURT: The statute says that a police officer who  
18 makes an arrest may take the fingerprints if such police  
19 officer is either unable to ascertain the identity, or suspects  
20 the identification is not accurate.

21          So you're saying that that means that only the  
22 arresting officer is able to make that determination?

23          MR. DUNN: Well, it doesn't have to be the arresting  
24 officer, it has to be the officer that's --

25          THE COURT: The statute says -- no, no the statute

1 says a police officer who makes an arrest --

2 MR. DUNN: Okay.

3 THE COURT: -- may take, or cause to be taken.

4 MR. DUNN: Recognizing that could involve an officer  
5 who is processing an arrest -- I think that's absolutely right.  
6 The person who is handling the arrestee, by the very terms of  
7 the statute, has to have a reason to question that person's  
8 identification.

9 THE COURT: Again, that's not the language of the  
10 statute. Maybe you should have the statute changed. The  
11 statute is limiting it to the arresting officer.

12 MR. DUNN: I understand that. But the arresting  
13 officer is the person processing the person. That's what  
14 happens. The arresting officer takes the person -- I am in  
15 agreement with you that, yes, the arresting officer has to have  
16 that. What they cannot do, by virtue of information you had  
17 months beforehand about other people, we are gonna conclude  
18 across the board that every person that presents themselves to  
19 us, even if they have a valid drivers license, we don't have to  
20 take that into account, and we can assume that we can print  
21 them, which is what they did.

22 THE COURT: And what about whether or not this creates  
23 a private right of action, and whether the remedy is damages as  
24 opposed to just the fingerprints getting destroyed?

25 MR. DUNN: As you point out, there are three cases

1 where the New York courts do exactly that, namely there were  
2 damages for unlawful fingerprinting. I agree there is not a  
3 large body of case law out there, but there are three cases all  
4 of which do the exact same thing. And in those three cases,  
5 while you are absolutely right that those are older cases, they  
6 are completely consistent with the case law in New York now  
7 about implied causes of action. And, you know, we said set  
8 that out in our brief. But, clearly, this is a statute that  
9 was intended to protect people from being improperly  
10 fingerprinted. And recognizing the violations consistent with  
11 that.

12 And there is no other remedy. I mean, yes, you can  
13 get your fingerprints sealed if there is a certain outcome in  
14 the case, but that's not a remedy for the taking of the  
15 fingerprints themselves and the damages associated with that.  
16 And we have three courts that have awarded damages to people in  
17 New York for exactly that.

18 So the final thing I want to say --

19 I'm sorry, unless you have further questions on the  
20 fingerprinting.

21 THE COURT: No.

22 MR. DUNN: I want to go back to the false arrest  
23 issues, very briefly, in reply to that.

24 I think you're completely clear about what the law is  
25 on this. I don't know if there is any disagreement between the

1 plaintiffs and you. But one issue I want to emphasize about  
2 16th Street, and you were focusing on this, was what's  
3 dispositive is, given that the marchers, however you want to  
4 describe them, got routed into a city block full of people, the  
5 dispositive question is what did the City actually do, or what  
6 did Inspector Essig do to separate the people who were perhaps  
7 the lawbreakers from everyone else there.

8 And you're right, the record is very sparse on this,  
9 the City has put in very little. But what is there is Essig  
10 says he sent Cortright and Johnson down the block, without any  
11 amplification, without any clear instructions, to tell people  
12 something about leaving the block.

13 THE COURT: All right.

14 MR. DUNN: And he says in his deposition, after about  
15 five minutes, he then started making arrests.

16 THE COURT: Right. So assume all of that to be the  
17 case.

18 MR. DUNN: That's right. So then the question is, is  
19 it reasonable in the circumstances in which he found himself,  
20 namely he has to seal off a block full of all kinds of people,  
21 some of which may be lawbreakers, many of which may be not, is  
22 it reasonable, as a matter of law, for him to conclude, based  
23 upon having sent two people down the block without any sound  
24 amplification, without any clear instructions, and without an  
25 order to people at the lines at either end to let people out,



1 was it reasonable under the circumstances for him to conclude  
2 that, five minutes later, that everybody in the block had  
3 engaged in unlawful activity and can be arrested.

4 And we submit as a matter of law, that cannot be  
5 reasonable and, therefore, we are entitled to summary judgment.

6 THE COURT: Okay, thank you.

7 MR. SPIEGEL: Your Honor, I'm going to be very brief  
8 on Fulton Street, because it is clear that there is a deep  
9 understanding of what happened there on the Court's part.

10 Mr. Moore assisted me with the Vodak reference  
11 regarding permission, then having been withdrawn. I want to  
12 look at the three violations that Mr. Farrell relied upon; more  
13 than two people abreast, crossing against the traffic light,  
14 parentheses, at an intersection at which police officers are  
15 guiding people across the street -- which I think obviates that  
16 one on its face. But even accepting that, the final one was  
17 that the banner was turned.

18 Incidentally, the two banner carriers, as it turns  
19 out, were not arrested. They actually ended up on the other  
20 side of the police lines, so they were not arrested at Fulton  
21 Street. But accepting that those three things took place, it  
22 does not support the City's position that that leads to a  
23 conclusion that 227 people on that block had banded together to  
24 violate the law. It's as simple as that.

25 The final thing I wanted to address, very briefly, Mr.

1 Farrell said that they did a sorting process after the 227  
2 people were surrounded. And the basis for that sorting process  
3 was credentialed media were released which, on its face, is an  
4 admission that the basis for releasing people was not their  
5 conduct that had been observed beforehand, but was their status  
6 as credentialed media. That's the entire basis of the sorting  
7 process.

8 THE COURT: Well, in fairness, it would not support a  
9 conclusion that they are not part of the collective action. If  
10 they are members of the media, they were not participants.

11 MR. SPIEGEL: But the City takes the position that,  
12 no, they saw everyone, regardless of whether or not they were  
13 media or not, engaging in the collective action.

14 THE COURT: I agree there is a tension between several  
15 points made by the City, but I'm asking you a different  
16 question.

17 So if the City sorted out, by media credential --

18 MR. SPIEGEL: Is that a sufficient sort?

19 THE COURT: -- wouldn't that be exactly what is  
20 contemplated in something like Bernini?

21 MR. SPIEGEL: No. I think that Bernini at least says  
22 what we looked at, what we tried to do, was to isolate the  
23 group that we believed had committed the unlawful act. And we  
24 separated out people that we didn't think committed an unlawful  
25 act. Whether or not someone is carrying a press credential is

1 not the condition, is not a basis upon which to distinguish  
2 whether or not someone had previously been committing an  
3 unlawful act.

4 THE COURT: Yeah, there again, but I think the group  
5 probable cause concept turns on membership in the collective  
6 and illegal activity; right?

7 MR. SPIEGEL: Yes.

8 THE COURT: So the members of the media are not gonna  
9 fall into the first category, are they?

10 MR. SPIEGEL: No. But many members of the media were  
11 there. And the bases for distinguishing was not whether or not  
12 you were actually participating in the illegal activity. As it  
13 turned out, the bases for distinguishing was whether or not you  
14 were carrying around a tag after the fact.

15 THE COURT: Well, again, I think one of the criteria  
16 requires there to be membership. If you have a thousand people  
17 and the goal is to stop traffic on Broadway and 42nd Street at  
18 that intersection, the goal is to get as many people into the  
19 intersection as possible to stop the flow of traffic. If you  
20 are not among the first hundred, maybe you're not in the  
21 intersection. But you are still going to be subject to arrest,  
22 I would think, because you are part of the group, you  
23 understood what the group was doing, the goal was to violate  
24 the law.

25 If you are a press person who is not part of the

1 group, just watching what is going on, if you are violating  
2 the -- the local traffic law ordinance, then you could be  
3 arrested on your own, but I don't think you are arrested just  
4 because you are tagging along with the group.

5 MR. SPIEGEL: I'm not suggesting that it was not  
6 proper to release people who were clearly part of the media,  
7 I'm suggesting that the sorting process was not a sufficient  
8 one to actually distinguish between the people who they claim  
9 were violating the law.

10 THE COURT: All right. I get that.

11 MR. MOORE: Just a couple of responses to the issues  
12 raised by Mr. Farrell and by the Court, in some of the  
13 questions.

14 They didn't in fact sort it out later. They didn't  
15 take people to Pier 57 and sort it out later as you suggested  
16 they might have done. There was no attempt, at any time,  
17 either during the arrest at 16th Street, other than the effort  
18 made by Johnson Cortright which we say was not sufficient as a  
19 matter of law, anyway.

20 THE COURT: But look, what Mr. Farrell says is that  
21 you have the testimony of those two officers, and then you have  
22 video that shows a lot of people walking out of there. And I  
23 mean it's clearly not the situation -- it's very different than  
24 Fulton Street, frankly, where the orange fencing goes around  
25 that whole group and nobody is getting out at that point.

1 There is a lot of people moving in and out for minutes --

2 MR. MOORE: Well, the whole --

3 THE COURT: -- after -- after, you know, they had been  
4 told that this is illegal activity, right?

5 MR. MOORE: Well, they have been -- nobody was told  
6 anything, no announcement, no directive, no anything by the  
7 police at 16th Street that there was illegal behavior going on;  
8 no notice, no warning order to disperse, none of that happened.  
9 In fact, all --

10 THE COURT: Certainly on the video, there is officers  
11 telling people that if you want -- if you don't want to get  
12 arrested, you'd better get out of here, right?

13 MR. MOORE: Fair enough. There are some officers say  
14 that. The question is were the efforts made by NYPD at 16th  
15 Street reasonably calculated to advise people who were not  
16 engaged in unlawful conduct so as to avoid this group arrest,  
17 that they had a right to leave. And we don't think, under any  
18 stretch of the imagination that happened.

19 There is only, Essig, himself, only says there were  
20 two officers who went down the street and came back, there was  
21 no amplification for what they were saying, they didn't give  
22 them any instructions about what to say. They only spent a few  
23 minutes, at most. There was no directive given to any of the  
24 officers at the barricade about whether they could or could not  
25 permit people to leave. In fact, all of the plaintiffs in

1 Macnamara, and if you look at our Rule 56.1 statement, all of  
2 them say they went up to the line and asked to be allowed to  
3 leave and were denied that, denied permission to leave. All of  
4 them say that. In fact, not just the Macnamara plaintiffs, but  
5 the additional plaintiffs in the other cases say that as well.

6 So and it's undisputed that people did try to leave  
7 and were prevented from doing that. And it's undisputed that  
8 people were not permitted to leave, at least -- at least many  
9 of the people, and certainly enough to suggest that no  
10 reasonable effort was made to really do this sorting process.  
11 I don't think you can conclude that any sorting of competent  
12 basis was ever done by the police. Simply sending two officers  
13 down the street for a couple of minutes without any  
14 direction -- in fact, what they were really doing, if you read  
15 Cortright and Johnson's deposition, is that they were focusing  
16 on the business owners to tell them to shut their doors and to,  
17 you know, shut the garage -- there was a big garage there, you  
18 see the garage on the video. So I just think that there was  
19 no -- as you said, the record is very thin with respect to the  
20 effort to call out, unlike in Bernini.

21 THE COURT: I'm not sure the record is so great in  
22 Bernini, honestly. What is there is the number of people who  
23 were let go, and I think the amount of time that was used to  
24 sort.

25 MR. MOORE: With respect to the video that Mr. Farrell

1 spoke about, that Mr. Rothman in his brief at footnote four  
2 lays out the circumstances of that. And I would -- that's one  
3 of the briefs that was submitted. And we would, you know,  
4 direct the Court so that it's clear that if you really look at  
5 the video, that the person who was getting out, individually  
6 Bradley Will, who is no longer with us, had simply slipped out  
7 when the cops were looking the other way.

8 In fact, he says at the beginning he was down at -- in  
9 the video -- Irving Place and was pepper sprayed when he tried  
10 to get out there. So that doesn't suggest that there was any  
11 sort of uniform or consistent efforts by the police at this  
12 location to cull out the dolphins from the tuna, as you say.

13 With respect to the no summons policy, Judge, let me  
14 say something else. Because, I think before I go to the no  
15 summons policy, I think there was a suggestion that the  
16 admission that was entered into the record by Judge Francis  
17 with respect to the lack of individual personal knowledge about  
18 what the plaintiffs did, the City has now had 8 years of this  
19 litigation to try to come up with some identification of some  
20 specific facts with respect to any of our plaintiffs and they  
21 failed to do so, other than with respect to one plaintiff at  
22 the library, which is not part of this motion. So, I would  
23 submit to you that they have had sufficient time to do that,  
24 they failed to do that, and I don't -- they haven't -- they  
25 haven't done, they don't they think they need to do it, or they

1     tried to do it and it's just not there.

2             Finally on the no summons policy, Judge, in addition  
3     to the argument made by Mr. Dunn, it's clear to me that this no  
4     summons policy runs afoul of the First and Fourteenth  
5     Amendment. And particularly the Fourteenth Amendment  
6     because -- and I think it no more graphically demonstrated by  
7     the Quality of Life effort which was specifically part of the  
8     RNC enforcement effort. And there were hundreds of people  
9     arrested, as Mr. Dunn said, in and around Madison Square  
10    Garden. The Quality of Life effort was directed at RNC venues,  
11    and hotels, and the Madison Square Garden; any venues where  
12    there were likely to be RNC delegates or RNC business  
13    happening. And those people, there was over 500 officers  
14    assigned to this effort as part of the overall law enforcement  
15    effort. They clearly focused on RNC-related events. Anybody  
16    charged with a violation summons-eligible offense, and there  
17    were hundreds of them. And we provide -- we give you the  
18    numbers in our brief. Anybody charged with the summonsable  
19    offense was given a summons in those circumstances. And so I  
20    really think it illustrates, to me anyway, that you have a  
21    policy if it, in fact, is based on the concern about terrorism,  
22    how can you justify a policy that says somebody arrested for  
23    having an illegal cart in front of Madison Square Garden, or  
24    somebody charged with disorderly conduct in front of Madison  
25    Square Garden an, who is not connected to some kind of



1 demonstration or protest activity, does not pose the same kind  
2 of threat, potentially, to those these events that were  
3 happening in the City at that time, than somebody who is  
4 demonstrating.

5 In fact, one could argue that somebody in that  
6 context, driving around in an unlicensed van, clearly evident  
7 than some of the other people who were given summons, might  
8 pose more of a threat. The fact is that it's a policy that  
9 specifically targeted protest activity. And there is a  
10 comparator. The comparator comes right from their own records,  
11 the Quality of Life offensive. And so we haven't moved for  
12 summary judgment on that policy, although I do think that,  
13 assuming on 14th Amendment grounds we might be entitled to  
14 summary judgment, but I'll leave that up to the Court.

15 In any event, I do thank you for your time and your  
16 careful consideration of the issues. And we respectfully  
17 request that the Court grant these motions for summary judgment  
18 on behalf of the plaintiffs.

19 THE COURT: And deny the ones for them, right?

20 MR. MOORE: Yes, Judge.

21 THE COURT: All right, Mr. Farrell.

22 MR. FARRELL: Your Honor, I'll just take those issues  
23 in reverse order.

24 On the equal protection claim, the evidence that  
25 plaintiffs have put in regarding the Quality of Life, first of

1 all, the Quality of Life team was in effect for a month prior  
2 to the RNC. And that's demonstrated in the -- that's stated  
3 explicitly in the exhibit that Mr. Moore attached. There are  
4 three exhibits relating to the Quality of Life. And when you  
5 look at the period of time for which it was in operation, it  
6 was for a month prior to the RNC and during the RNC.

7 So there is no way to tell from that exhibit which,  
8 when summons were given, whether they were given prior to the  
9 RNC, or during the same time as when the policy, no summons  
10 policy for the RNC was in effect, that's the first thing. So  
11 that evidence is not competent on that point.

12 The second thing is that they have given no -- there  
13 is no evidence on the equal protection claim as to who the  
14 proper comparative class would be. You can't, even if you  
15 assumed that their Quality of Life exhibits related only to the  
16 same time period as when the RNC no summons policy was in  
17 effect, which it doesn't. But if you assume that, there is no  
18 way to tell from just the number of summonses what those people  
19 were engaged in, when they got summons or didn't. You don't  
20 know, just on the face of that document, whether that person  
21 was engaged in First Amendment activity, or was not engaged in  
22 First Amendment activity. That's a burden that is on  
23 plaintiffs on equal protection claim. So their claim fails  
24 because they have not satisfied that component of equal  
25 protection. They have not shown submitted, admissible evidence

1 on who the comparative class should be.

2 The last point on that is there is absolutely no  
3 evidence in the record of animus on behalf of the police  
4 department. It is completely devoid of animus. They have  
5 taken -- 2005. They have taken almost 6 years of deposition  
6 testimony. They deposed the chief of department for nine days  
7 over four, five years resulting in 1900 pages of testimony.  
8 They have deposed Commissioner Cohen over multiple days  
9 resulting in thousands of pages of testimony. There has been  
10 hundreds and hundreds of depositions in this case. And through  
11 that entire time, we're before you today on summary judgment  
12 motions, and they have not put before this Court one single  
13 piece of evidence that the City had an animus to retaliate or  
14 get back at protesters or demonstrators.

15 As to Schiller and Dinler's counsel's point about  
16 Commissioner Cohen and the disclosure being made and the timing  
17 of that disclosure, that was a technical issue before  
18 Magistrate Francis. The fact of the matter is, Magistrate  
19 Francis said you need to put them explicitly in 26A disclosure.  
20 But the fact of the matter is, over the years of testimony  
21 before that, many people had testified about Commissioner  
22 Cohen's role in providing the intelligence information upon  
23 which the policies were based. And Mr. Dunn wanted additional  
24 discovery in that matter. And that was the only basis for  
25 allowing the discovery, additional discovery, that we as the

1 City, did not explicitly list Commissioner Cohen as a witness  
2 in 26A disclosure. So this was not a secret about Commissioner  
3 Cohen, it was not a last minute attempt by the City to create  
4 some evidence to defend the policies.

5 And what goes hand in hand with that is that  
6 Commissioner Cohen -- I'm sorry, Chief Esposito, who was  
7 deposed both before and after that, through the nine days of  
8 deposition over multiple years, he never wavered on what the  
9 reasons were for the policy. They were always the same, he  
10 reiterated them time and time again, and that doesn't change.  
11 The fact the plaintiffs' counsel points to that Commissioner  
12 Cohen doesn't remember the policy, Commissioner Cohen is not a  
13 policy --

14 THE COURT: Commissioner Cohen or Esposito.

15 MR. FARRELL: Chief Esposito remembered the policy.

16 THE COURT: Oh --

17 MR. FARRELL: He was unwavering on the reasons the  
18 policy was adopted. The things that he -- he was not so sure  
19 of was who attended what meeting when. And these are in  
20 depositions regarding meetings that took place in 2004. The  
21 depositions are in 2006 and 2010, several years after the  
22 activity. And plaintiff's whole case boils down to, oh, well,  
23 the Chief of the Department who has a myriad of  
24 responsibilities and duties, who attends thousands of meetings,  
25 can't remember exactly who was at a particular meeting.

1           The bottom line is the Chief of the Department has  
2 provided the reasons the policies were adopted, never wavered  
3 on what those were. And the fact that Commissioner Cohen  
4 doesn't recall the policy, he was not a policymaker. His role  
5 in the department is to collect information and provide it to  
6 the policymakers. He is not a policeman, he spent his time at  
7 the CIA gathering intelligence. So that fact does not -- is  
8 immaterial to the reasons why the policies were adopted.

9           And then on whether the policy was content neutral, I  
10 would point the Court to the cases that we cite in our brief,  
11 Ward and those other cases, and I think on the undisputed facts  
12 of this case, that those lead to the conclusion that the policy  
13 was content neutral.

14           I have to add one thing that was raised for the first  
15 time in reply by plaintiffs' counsel. One was that Essig and  
16 Dieckmann, 16th Street, testified they observed people leaving  
17 the block. So when he asked for facts and when he was  
18 responding to that, that was an additional fact that is in the  
19 record, on top of the other facts, that makes it reasonable  
20 for them to believe that the people they had at the end of that  
21 period were the ones who intended to stay there and continued  
22 to participate in the unlawful activity. And then the last  
23 thing he said was someone got pepper sprayed, no one got  
24 pepper sprayed trying to leave the block. It was a non  
25 sequitur, so I'm not sure what the record of someone being

1 pepper sprayed on 16th Street had to do whether people had an  
2 opportunity to leave the block, or whether the people placed  
3 under arrest, in fact it was reasonable to believe for the  
4 police to believe that those were the ones that had engaged in  
5 unlawful conduct.

6 MR. ROTHMAN: May I address the last statement about  
7 the pepper spray, because it relates to this video that's been  
8 referenced. This as my former client, Brad Will. He brought a  
9 suit --

10 THE COURT: Are you going to let me say "yes" or "no."

11 MR. ROTHMAN: I thought you would indulge me, but  
12 please.

13 THE COURT: Well, I might.

14 But Mr. Rothman, since the City went over, I have  
15 given you more time, I'm going to let Mr. Rothman get the last  
16 word.

17 MR. ROTHMAN: Very briefly, your Honor.

18 Mr. Will was a videographer. He's seen on the video  
19 that is referenced entering the block of 16th Street and going  
20 westbound on the northern sidewalk. When he gets to Irving  
21 Place, an officer -- you can see it very clearly on the video.  
22 As they are constructing the line, an impermeable line, from  
23 building line to building line, takes out a canister of pepper  
24 spray, sprays it from hip level, and the pepper spray actually  
25 lands on his camera as he was going up to try and talk to the

1 officer. You hear him say, why did you pepper spray me, why  
2 did you pepper spray me, no response. He then goes into the  
3 block, has a conversation with Lieutenant Johnson. Asked  
4 Lieutenant Johnson, can the people go back to the park.  
5 Lieutenant Johnson, one of the two Lieutenant that Essig  
6 dispatched said, yes, go on the sidewalk. And they go back  
7 towards the park, they can leave.

8 And when Essig was asked in his deposition whether or  
9 not Johnson was authorized to say, that Essig said, no, they  
10 couldn't leave, because at that point everybody was going to be  
11 arrested. Which illustrates the unreasonableness and a lack of  
12 coordination of the police at that scene.

13 And in terms of how he got off the block, you can see  
14 very clearly on that video that Mr. Will snuck out of the block  
15 as the officers on the Union Square east side were starting to  
16 come in to effect the arrest. It was very crafty of him, very  
17 stealthy, I congratulate him on his stealthiness, but it was  
18 not indicative as to whether or not the 300 people on that  
19 block would have been able to have left at either one of the  
20 sides of the block, which had impermeable police lines. And I  
21 will refer you to the reply brief which discusses the video and  
22 the footnote.

23 THE COURT: It's not whether 300 people would have  
24 been free to leave, it's whether people not involved in illegal  
25 activity and were not part of the group. So it's whether the

1 dolphins could leave, not whether the tuna could leave, right?

2 MR. ROTHMAN: Well, and Mr. Moore has discussed very  
3 clearly, and Mr. Dunn, as well, that sending two lieutenants  
4 without amplification up and down the block for a period of  
5 five minutes to have one-on-one conversation with a shifting  
6 mass of humanity, many of whom nobody could tell looking at  
7 these people whether or not they had marched in the street,  
8 whether or not they just were walking down the sidewalk,  
9 whether they had come out of a cafe, whether or not they had  
10 entered -- like Mr. Dunn's client from the Irving Place side  
11 whether or not, like my client Betty Bastidas, and multiple  
12 people visible on that video who crossed over after the police  
13 had directed the whole group of people onto the block, there is  
14 a pulse of people who are seen on the defendant's videos who  
15 crossed directly from Union Square Park, because they're  
16 curious, because there is a marching band on a street on a  
17 beautiful summer evening. People are drawn by the music, check  
18 it out and see what's going on. They have a First Amendment  
19 right to do that, which hasn't been mentioned. So people, they  
20 gravitate it towards this block, lines are thrown up on the  
21 block. There is no remotely reasonable attempt made to tell  
22 everybody who was present there, if you don't want to get  
23 arrested, you need to go on your way now, because we need to  
24 clear this street. Essig, in fact, says that everyone on that  
25 block, other than those few episodic people that Johnson and



1 Cortright happened to go up to and say without any criteria,  
2 oh, you can leave, you can leave. Everybody on that block, the  
3 intent was to arrest everybody on that block, Essig said that.  
4 And it's clear he didn't communicate appropriately with  
5 Johnson, because Johnson gave people instructions that Essig  
6 explicitly testified he was not authorized to give. And  
7 Johnson told the people go on the block. And you can see on  
8 the video, Mr. Will in response to Johnson tells the people, go  
9 on the sidewalk, and go just on the sidewalk back to the park  
10 and you can leave. And they could not. Because everybody on  
11 that block was going to be arrested.

12 So I would refer you to that video and to the  
13 discussion of it in my reply brief. And I would rely on the  
14 statements of my colleagues, as a matter of law, the attempt to  
15 notify 300 people, 400 people, on an entire city block, right,  
16 it is unreasonable as a matter of law for two people without  
17 amplification to mill around and have private conversations and  
18 say, you're dolphin, you should leave.

19 THE COURT: Your view is that had the police cordoned  
20 off the entire street, made an announcement that says dolphins  
21 are free to leave, show your credentials to the officers at the  
22 south end or west end, and then they came through and showed --  
23 I don't know what the criteria would be, but the police  
24 basically said, yeah, you look like a dolphin, you can go, no,  
25 you're a tuna, you have a saxophone in your hand, you're

1 staying, that would have been okay, that would have passed  
2 muster.

3 MR. ROTHMAN: What would have passed muster is if they  
4 made an appropriate amplified dispersal order to put people on  
5 notice that they had to leave and gave reasonable opportunity  
6 for people to leave, and if they had some specified  
7 individualized knowledge that such a person was a lawbreaker,  
8 let's say a saxophonist, let's say a particular cop saw a  
9 particular saxophonist who he recognized was marching in the  
10 street playing, you know, When The Saints Come Marching In, and  
11 that cop recognized that saxophonist, so arrest that  
12 saxophonist, don't arrest my client, Betty Bastidas, with  
13 United Nations Press passes around her neck, or Thea Rigby, who  
14 also had press credentials, or the other four people who  
15 Mr. Upton and I represent, who had no indicia that they were  
16 involved with any march or parade, because they were not. They  
17 just happened to be in the Union Square area, heard something  
18 boisterous going on, wanted to check it out. They were dressed  
19 in regular civilian clothes, Ms. Caspa was on her way to visit  
20 her sick aunt, another one just come from shopping. They were  
21 just in the area and went over to check it out. And so nobody  
22 could ever have had a reason to think that they were -- I don't  
23 know which one is the bad one, the tuna or dolphin.

24 THE COURT: The dolphins are good tasting, but high in  
25 mercury.

1 MR. ROTHMAN: Nobody could have thought they were  
2 tuna. There was no indication for any reasonable officer to  
3 think that they were not a dolphin. And so there was no remote  
4 reason for them to think they had probable cause to arrest the  
5 clients that Mr. Upton and I represent, and everybody else who  
6 was on that block, unless they had some particularized reason  
7 to think that they had broken some particularized law.

8 And Essig admits he had no idea who was or was not on  
9 the sidewalk, and who was or was not in the roadway.

10 He admits that.

11 THE COURT: Thank you. Stop you now, just because  
12 we're exactly the same.

13 MR. ROTHMAN: Thank you, your Honor.

14 THE COURT: Each of you got an hour and 16 minutes, so  
15 I think -- actually, now, the plaintiffs get 30 seconds more.

16 I'll give you 30 seconds, Mr. Farrell, that's how  
17 scrupulous I am. The court reporter is gonna kill me.

18 MR. FARRELL: Take my thirty seconds.

19 Mr. Rothman admitted that his clients were there, that  
20 they were proceeding with the group as it came down. It's not  
21 what is in their head that is important, it's whether the  
22 police officers really believed --

23 THE COURT: No, I get the standard.

24 MR. FARRELL: And another thing I would point to is in  
25 case in Carr in the Second Circuit case, the Court there

1 recognizes that on the facts of that case, the people that came  
2 and were part of the march or perceived to be part of the  
3 march, do not have a claim for false arrest. They said the  
4 only people under the facts of that case would be, assuming  
5 that they were perceived to be engaging in unlawful activity,  
6 that that was shown, would be the people that were in the  
7 alleyway, because the group, if you remember, disbursed and ran  
8 in an alleyway. So the cops lost sight of who was there,  
9 whereas in our case everybody is located right around the  
10 group. In the alleyway, the Carr case says the only people in  
11 Carr who would have a false arrest claim, are the ones who if  
12 it was not reasonable that the police then closed off the block  
13 and people had gotten in through the line. It says that you  
14 have to read the case very carefully, there's two specific  
15 segments in the case that say that.

16 THE COURT: I don't want to overstate the Eighth  
17 Circuit's opinion, it's not binding and pressing on me, it's on  
18 point. And so I have looked at it. And you have all cited it.  
19 But we shouldn't overstate the significance of it.

20 MR. FARRELL: The Carr case was out of the DC Circuit  
21 page 406 and 409, but that points to the fact that there was no  
22 case law in the Second Circuit addressing these issues. The  
23 law was not clearly established, and the clients had a minimum  
24 of ties to qualified immunity.

25 THE COURT: It's now 6:10, it's been a long day. I

1 want to thank all who argued, and all who assisted to prepare  
2 them. And the court reporter who doesn't get a break the  
3 entire time.

4 I'll thank the court security officer and -- no  
5 applause. And you should clear out of here in 10 minutes or he  
6 is going to summons you. I don't mean to make light of this,  
7 obviously these are very important issues that have great  
8 implications for many people. So it's a source of great regret  
9 for me that this is taking so long. That's the nature of mass  
10 arrest cases. And there are others out there that have taken a  
11 long time.

12 I do want to get this moving. Discovery took forever.  
13 And I'm not blaming anybody for that, but we now have to really  
14 get this going. So I am going to reserve for a very short  
15 period so I can collect my thoughts, absorb the arguments that  
16 have been made, but I want to turn this around quickly. And  
17 then after I rule, I suppose then we'll talk about what's next,  
18 because I think depending on how I rule will affect the answer  
19 to that question, okay.

20 MR. FARRELL: I would just like to say while I was  
21 speaking I also want to give credit to the entire team that was  
22 behind me, while I was the one --

23 THE COURT: This isn't the Oscars, Mr. Farrell.

24 MR. FARRELL: I just wanted to give credit to the  
25 entire team behind me. Thank you.

THE COURT: And we're adjourned.

(Adjourne)